Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

BANKNOTE CORPORATION OF AMERICA, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a successor that hires a "substantial and representative complement" of its employees from the predecessor's workforce within a few days after the closing of the predecessor's operation commit an unfair labor practice by unilaterally implementing employment terms and conditions when it is not a "perfectly clear" successor and the predecessor's unions have made no bargaining demands?

2. If so, did the National Labor Relations Board act in excess of its statutory authority by ordering a remedy that effectively binds the successor to its predecessor's collective bargaining agreements despite the successor's explicit rejection of those agreements and its pre-hiring announcement that it would implement new and different terms and conditions of employment?

LIST OF ALL PARTIES

Banknote Corporation of America, Inc. and the National Labor Relations Board were the only parties in the proceeding before the United States Court of Appeals for the Second Circuit. Banknote Corporation of America, Inc. is a subsidiary of Francois-Charles Oberthur Fiduciaire, a French corporation that is privately owned and has no publicly traded shares. Banknote Corporation of America, Inc. has no subsidiaries.

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I. OPINIONS BELOW

On March 3, 1992, Barry J. Morris, Administrative Law Judge ("ALJ") for the National Labor Relations Board (the "Board"), issued its decision and recommended order against Petitioner. The ALJ's decision, as it was included in the Board's Decision and Order, is reproduced in the Appendix at 56.

On December 16, 1994, the Board issued its Decision and Order, In the Matter of Banknote Corporation of America and Graphic Communications International Union, Local 119B-43B, and New York Lithographers & Photo Engravers Union, #1-P, G.C.I.U. and District 15, International Association of Machinists & Aerospace Workers, 2-CA-24304, 2-CA-23371, and 2-CA-24500 adopting the ALJ's opinion. The Board's decision, 315 NLRB No. 155, is reproduced in the Appendix at 35.

On May 29, 1996, the United States Court of Appeals for the Second Circuit issued its decision in *Banknote Corporation of America, Inc. v. NLRB*, 84 F.3d 637 (2d Cir. 1996). The Second Circuit's decision enforcing the Board's Order is reproduced in the Appendix at 1.

The Second Circuit's denial of Petitioner's Petition for Rehearing with Suggestion for *En Banc* was entered on August 1, 1996 and is reproduced in the Appendix at 75.

II. THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision on May 29, 1996. On July 11, 1996, Petitioner timely filed a Petition for Rehearing With

Suggestion for *En Banc* ("Petition for Rehearing") pursuant to Federal Rules of Appellate Procedure 40 and 35. The Second Circuit denied that petition on August 1, 1996. Petitioner now files this Petition for Writ of Certiorari with the Clerk of this Court within ninety days of the Second Circuit's denial of the Petition for Rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. STATUTORY PROVISIONS

TITLE 29, UNITED STATES CODE:

§ 158 Unfair Labor Practices

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.
>
> . . . .
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

IV. STATEMENT OF THE CASE

The Board had jurisdiction under 29 U.S.C. §§ 160(a) & (b) to issue a Complaint under §§ 8(a)(1) & (5) of the National Labor Relations Act ("NLRA") and to try this case before the ALJ. The Second Circuit had jurisdiction under 29 U.S.C. § 160(e) to review and enforce the Board's Decision and Order.

Prior to 1990, there were only two major American high-security printing companies[1]: American Bank Note Company ("ABN") and United States Banknote Company ("USBN"). In mid-1989, USBN initiated a tender offer for the stock of ABN's parent company, and the Justice Department's Antitrust Division conditioned approval of the deal upon establishment of a viable competitor. Petitioner Banknote Corporation of America, Inc. ("BCA") was formed as an American subsidiary of Francois-Charles Oberthur Fiduciaire, a French security printing firm, to become USBN's competitor. To begin operations, BCA purchased assets from ABN and assumed ABN's lease obligations for a plant in Suffern, New York (the "Ramapo plant").

Under ABN's operation, eleven unions represented just 102 employees at the Ramapo plant. Job duties were limited along strict craft lines in accordance with decades-old traditions antedating significant technological changes in the printing industry. Before hiring any of

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[1] High-security printing companies produce documents that have intrinsic value or require counterfeit protection. Such documents include stock and bond certificates, government visas, title certificates, food stamps, and postage stamps.

its predecessor's employees, BCA told applicants they would be asked to perform a greater variety of tasks in an effort to improve productivity. Consistent with such advance notice and in accordance with its decision to operate with a much smaller workforce, BCA verbally and in writing rejected ABN's collective bargaining agreements and explicitly announced that it would operate under new terms and conditions of employment. BCA hired approximately half of ABN's employees and began limited operations six days after ABN's shut-down of the Ramapo plant. Just four days later, on April 23, 1990, BCA distributed its specific terms and conditions of employment.

The three unions involved in this case (the "Unions") filed unfair labor practice charges against BCA alleging that BCA refused to bargain with them. Not one of the Unions had made a demand upon BCA for recognition or bargaining before filing its unfair labor practice charge.

The Board issued a consolidated complaint on November 21, 1990 claiming that BCA violated §§ 8(a)(1) & (5) of the NLRA. The parties tried the case before the ALJ on April 15-19, 1991. The ALJ found that BCA was a successor employer to ABN and that BCA had violated §§ 8(a)(1) & (5) by "refusing to negotiate" with the Unions when it implemented its specific terms and conditions on April 23, 1990. [A-68]. The ALJ did not address whether the Unions were required to make a bargaining demand as a condition precedent to holding BCA liable for its actions on April 23, 1990.

BCA filed exceptions to the ALJ's decision with the Board, which issued a Decision and Order on December

16, 1994 adopting the ALJ's recommended order.[2] The Board found that BCA had effectively announced its intention not to assume ABN's collective bargaining agreements and had announced certain new terms and conditions of employment simultaneously with its stated desire to retain some of ABN's workforce. [A-37, 43]. The Board therefore ruled that BCA was not a "perfectly clear" successor[3]; that its obligation to bargain with the Charging Parties "attached" on April 19, 1990 when BCA hired its employees; and that BCA therefore necessarily violated §§ 8(a)(1) & (5) by unilaterally distributing its specific terms and conditions of employment on April 23. [A-43, 48-49].

The premise of the Board's ruling was the ALJ's finding that BCA had announced only two of its terms and conditions of employment when it offered jobs to ABN's workforce on April 19.[4] The Board upheld the

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[2] The Board's Decision and Order was divided, with member Stephens dissenting.

[3] For the sake of clarity, successors like BCA that are not "perfectly clear" successors are referred to hereinafter as "ordinary" successors.

[4] The two specifically announced terms were: (1) that BCA would introduce greater job flexibility, and (2) that ABN's health benefits would remain in effect for sixty days after employment with BCA began. [A-37-38]. The Board agreed with the ALJ that *Royal Vending Services*, 275 NLRB 1222, 1222-28 (1985) justified a finding that BCA violated §§ 8(a)(1) & (5). [A-40]. Neither the ALJ nor the Board, however, addressed the fact that *Royal Vending Services* dealt only with a perfectly clear successor. By definition, a perfectly clear successor has a duty to bargain over initial terms and conditions of employment. As both the ALJ and the Board acknowledged, BCA had no such duty.

ALJ's finding because BCA did not announce the remainder of its employment terms until *four days later*. Like the ALJ, the Board failed to address whether the Unions were required to make a bargaining demand before BCA could be held liable for an unlawful refusal to bargain. Accordingly, the Board adopted the ALJ's recommended order, which states in relevant part that BCA must

> restore the status quo by rescinding, on request from the Unions, those unilateral changes put into effect on April 23, 1990, which were not previously announced; and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970). . . . [A-69].

Although its Decision and Order does not say so explicitly, the Board argued to the Second Circuit, in effect, that the "status quo" for purposes of "make whole" relief should be established by reference to the rejected ABN collective bargaining agreements. [A-77]. In support of this argument, the Board relied upon the general principle that "[w]here an employer remains in business, but its contract with a union expires, most contractual terms and conditions of employment survive, not by virtue of the contract, but by operation of law. . . . " [A-77] (citing *Litton Financial Printing v. NLRB*, 501 U.S. 190, 199 (1991)). In other words, according to the Board's interpretation of its "make whole" remedy, BCA is bound to the terms of the very

collective bargaining agreements that BCA specifically rejected.[5]

BCA timely filed a Petition for Review of the Board's Decision and Order with the United States Court of Appeals for the Second Circuit. The Second Circuit denied BCA's Petition and enforced the Board's Order on May 29, 1996. The court of appeals acknowledged that the Supreme Court, federal courts of appeals and the Board uniformly have required both a bargaining demand by a union and the hiring of a "substantial and representative complement" of employees as conditions precedent to an ordinary successor's liability for refusal to bargain with its predecessor's unions. [A-15-16]. Nevertheless, the Second Circuit decided to enforce the Board's Order and held that BCA unlawfully refused to bargain despite the fact that the Unions had made no bargaining demands.

The Second Circuit's rationale for this departure from long-established labor law precedent was grounded in a novel and insupportable distinction between successors who achieve successorship status through "rapid transition" and those who engage in "gradual hiring" of their predecessor's employees. [A-18-21]. The Second Circuit reasoned that an employer who gradually hires its predecessor's employees might have "considerable doubt" as

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[5] The ALJ's recommended order included a make whole remedy to be calculated in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970). [A-69]. In *Ogle*, the Board found that a make whole remedy was justified by an employer's refusal to execute a contract *it had already negotiated* with its unions. By its own terms, therefore, *Ogle* has no application to a successor like BCA that lawfully refuses to assume collective bargaining agreements negotiated by its predecessor.

to the incumbent unions' continuing majority status, whereas the employer in a "rapid transition" can "easily discern its obligation to presume" whether or not the unions continue to have majority support. [A-18]. Thus, according to the Second Circuit, although a bargaining demand is necessary in the "gradual hiring" context for the purpose of giving the successor employer "additional certainty" concerning its legal obligations, a demand is superfluous in a so-called "rapid transition" because the successor is already sufficiently certain of its duty to bargain. *Id.*

Relying upon its own newly created "rapid transition" exception to the requirement of a bargaining demand, the Second Circuit concluded that BCA's bargaining duty "attached" when it hired ABN's employees on April 19, 1990. [A-21]. As a result, according to the court below, BCA was no longer free at that point to unilaterally implement terms and conditions of employment. Thus, under the Second Circuit's unprecedented holding, an ordinary successor can unlawfully refuse to bargain even when the union has not requested it to do so. [A-21-22].[6] The Second Circuit enforced the Board's entire Order, including a "make whole" remedy that the Board had argued must be calculated by reference to the very terms of the ABN collective bargaining agreements that BCA had specifically rejected. In effect, the Second

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[6] The Second Circuit also held that the employment terms and conditions announced by BCA four days after hiring the former ABN employees were not "initial" ones and that BCA's implementation of those terms was accordingly unlawful. [A-21-22].

Circuit bound BCA to the ABN agreements despite BCA's rejection of those agreements and its pre-hiring notice to former ABN employees that it would implement new and different employment terms and conditions.

V. REASONS FOR GRANTING THE PETITION

The Second Circuit's decision ignores decades of Supreme Court and Board caselaw holding that an employer is required to bargain only when a union makes a bargaining demand and that an employer cannot be compelled to agree to a union's proposal during collective bargaining. The decision below specifically violates this Court's holdings in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (*"Fall River Dyeing"*) and *NLRB v. Burns International Security Systems, Inc.*, 406 U.S. 272 (1972) (*"Burns"*). It also directly conflicts with decisions of the Fifth and Sixth Circuits and even with decisions of the Board.

In holding that a so-called "rapid transition" successor violates § 8(a)(5) when the predecessor's union has not even made a bargaining demand, the Second Circuit seriously misconstrued *Fall River Dyeing* in defiance of the time-honored rule of labor law that a bargaining demand is a prerequisite to an employer's liability under § 8(a)(5). Left unreviewed by this Court, the Second Circuit's decision to excuse the requirement of a bargaining demand will upset nearly sixty years of labor relations practice grounded in the precedent of this Court. It will also result in unnecessary litigation over arbitrary line-drawing in future cases. Excusing the requirement of a bargaining demand relieves a union of a burden that is

easy to satisfy and needlessly requires the successor to presume the union's desire for continuing representation. This will encourage new employers to delay the hiring of a "substantial and representative complement" of employees in the successorship context, a result that adversely affects employees and is antithetical to the NLRA's underlying purpose of promoting stability in labor-management relations.

In addition, effectively binding BCA to the terms of its predecessor's collective bargaining agreements is contrary to *Burns* and its progeny and violates the explicit command of § 8(d), 29 U.S.C. § 158(d), that nothing in the NLRA compels an employer to agree to a union's proposal during collective bargaining. The Second Circuit's decision, which requires BCA to accept the results of another employer's bargaining, is also squarely at odds with a decision of the Ninth Circuit. A successor has the right to negotiate its own bargain based on its own economic situation and operational concerns. The result achieved through the give-and-take of bargaining between the employees' representative and their current employer is crucial to the NLRA's policy of labor stability.

This Court has not addressed successorship issues of the kind raised in this case since 1987. Supreme Court review is particularly necessary to clarify uncertainties among the circuits over the meaning and implications of both *Burns* and *Fall River Dyeing*.

A. The Second Circuit's holding that a bargaining demand is unnecessary in a "rapid transition" case conflicts with the established caselaw of this Court, other federal courts of appeals, and the Board itself.

1. Supreme Court, circuit court, and Board caselaw require a bargaining demand to hold an ordinary successor liable under § 8(a)(5) for unilateral implementation of employment terms.

For nearly sixty years, the law of this Court has been that a bargaining demand is a prerequisite to an employer's § 8(a)(5) duty to bargain with a union. *NLRB v. Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292, 297 (1939) ("[T]here can be no breach of the [§ 8(a)(5)] statutory duty by the employer . . . without some indication given to him by [the employees] or their representative of their desire or willingness to bargain."). In the successorship context, this Court has held that an ordinary successor is obligated to bargain with its predecessor's unions only when two things coincide: (1) the employer has hired a majority of its employees from its predecessor's unionized workforce at the "substantial and representative complement" date, and (2) the union has made a bargaining demand. *Burns*, 406 U.S. at 278; *Fall River Dyeing*, 482 U.S. at 47, 54. Until the Second Circuit's decision in this case, the circuit courts and the Board uniformly followed suit.[7]

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[7] *See, e.g., Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1286-87 (6th Cir. 1989); *Nephi Rubber Products Corp. v. NLRB*, 976 F.2d 1361, 1365 n.6 (10th Cir. 1992); *Williams Enterprises, Inc. v.*

In *Burns*, the successor hired its predecessor's unionized employees over a period of weeks in late June, 1967 and began operations on July 1, 1967 with new terms and conditions of employment. The Court held that the successor's bargaining duty "matured" in late June, but the successor did not "refuse to bargain" with the union until it failed to bargain in response to the union's July 12, 1967 bargaining demand. *Burns*, 406 U.S. at 54. Thus, under *Burns*, an employer can unilaterally establish terms and conditions of employment without violating § 8(a)(5), even though it is a successor with a "duty to bargain," if it has not received a bargaining demand. *See also Fall River Dyeing*, 482 U.S. at 39. *Fall River Dyeing* extended *Burns* by holding that a union could make an effective bargaining demand before the successor hired its "substantial and representative complement" of workers. In so holding, this Court stated that "[o]nce the employer has concluded that it has reached the appropriate complement, *then*, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union already has made a demand for bargaining." *Id.* at 54 (emphasis added).

On facts materially indistinguishable from the circumstances of this case, both the Fifth and Sixth Circuits have interpreted this Court's caselaw in a straightforward fashion to mean that an ordinary successor cannot violate § 8(a)(5) in the absence of a bargaining demand by the predecessor's union. Significantly, both the Fifth and Sixth Circuit cases involved ordinary successors of the

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NLRB, 956 F.2d 1226, 1232 (D.C. Cir. 1992); *Royal Midtown Chrysler Plymouth, Inc.*, 296 NLRB 1039, 1040 (1989).

kind that the Second Circuit in this case subsequently categorized as "rapid transition" successors. In *NLRB v. Wayne Convalescent Center, Inc.*, 465 F.2d 1039, 1042 (6th Cir. 1972) (*"Wayne Convalescent Center"*), where the ordinary successor achieved a so-called "rapid transition" by continuing its predecessor's business without interruption and with no substantial changes in operation or personnel, the Sixth Circuit held that although the ordinary successor had a "duty to bargain" with incumbent unions when it hired its employees, it was free to make "unilateral changes in conditions of employment" prior to receiving a bargaining demand. In *NLRB v. Houston Building Service, Inc.*, 936 F.2d 178 (5th Cir. 1991), *cert. denied*, 502 U.S. 1090 (1992) (*"Houston Building Service"*), a case in which the successor immediately hired all its predecessor's employees when it took over the predecessor's janitorial contract, the Fifth Circuit stated that " '[o]nce a representative workforce is achieved . . . the successor has an obligation to bargain with the union that represented those employees,' *assuming that the union made a bargaining demand*" (quoting *Fall River Dyeing*, 482 U.S. at 47) (emphasis added).

Similarly, in *Royal Midtown Chrysler Plymouth, Inc.*, 296 NLRB 1039 (1989) (*"Royal Midtown"*) – which the Second Circuit conceded to be a "rapid transition" case [A-19-20] – the Board stated that "[t]he fact that the union represents a majority of the successor's employees in an appropriate unit [does not] operate alone to invoke the bargaining obligation; and this is so even when the successor has attained a 'substantial and representative complement' of employees." *Royal Midtown*, 296 NLRB at 1040. It is not surprising, therefore, that the Board itself

did not argue before the Second Circuit for a distinction between "gradual hire" and "rapid transition" successors. Instead, the Board argued that BCA became a perfectly clear successor when it reached the "substantial and representative complement" date. [A-21 n. 4, 77]. The Second Circuit rejected that argument, noting that

> [t]o apply [the perfectly clear] label to BCA on the theory that an employer can "ripen" into a perfectly clear successor is to ignore the legal significance that has attached to that term: a perfectly clear successor, unlike an ordinary successor, acquires a duty to bargain *prior* to hiring its predecessor's employees.

[A-21 n.4]. The Second Circuit then stated:

> . . . [W]e take the General Counsel's point to be that, once it is plain to an employer that a majority of the employees in a bargaining unit are former employees of the predecessor, the employer is required to presume that a union's majority status continues, regardless of whether the union has made a bargaining demand. Where, as here, there is a rapid transition from one employer to another and the predecessor's employees are rehired almost immediately, we agree.

Id. As this language reveals, despite rejecting the Board's plainly meritless argument that BCA "ripened" into a "perfectly clear" successor, the Second Circuit, by creating its own two categories of "rapid transition" and "gradual hire" ordinary successors, eliminated as a practical matter the legal significance between ordinary and "perfectly clear" successors.

2. The Second Circuit's new rule for "rapid transition" successors conflicts with established federal labor law precedents.

The Second Circuit's holding that a "rapid transition" successor is obligated to bargain with its predecessor's union even when there is no bargaining demand not only violates *Burns* and *Fall River Dyeing*, it creates a split among the circuits. Its decision cannot be reconciled with the better reasoned decisions of the Fifth Circuit in *Houston Building Service* and the Sixth Circuit in *Wayne Convalescent Center*. In addition, the Second Circuit's rationale must have surprised even the Board itself because it implicitly overrules the Board's own holding in *Royal Midtown* that reaching a "substantial and representative complement" of employees does not alone operate to "invoke" the bargaining obligation and thus subject a successor to § 8(a)(5) liability.

Fall River Dyeing set forth a two-pronged test requiring both a "substantial and representative complement" *and* a bargaining demand as prerequisites to a successor's liability for unlawful refusal to bargain. The Second Circuit held that the "broadly stated" requirement of a bargaining demand is inapplicable to this case because that requirement developed within the specific factual context of a "start-up" period involving a "gradual hiring" of employees. [A-18]. This distinction by the court below between "rapid transition" and "gradual hiring" rests upon a faulty premise.

The Second Circuit stated that a union is not required in a "rapid transition" case to make a bargaining demand

because it is "immediately clear" to the ordinary successor that a majority of its employees in the relevant bargaining unit worked for the predecessor, whereas there may be "considerable doubt" of the union's continuing majority status in cases involving "gradual hiring" or a hiatus in operations. *Id.* The court below then incorrectly reasoned that the "rapid transition" made it easy for BCA to "discern *its obligation to presume* that the representatives of ABN's employees continued to enjoy majority status." *Id.* (emphasis added). The error in this rationale is the Second Circuit's failure to distinguish between a rule of law and an employer's obligation. While the *Board* presumes a union's continuing majority status under certain circumstances, *Washington Service Contractors Coalition v. District of Columbia*, 54 F.3d 811, 816 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 1015 (1996), the successor itself has no *obligation to presume* anything. Nor is there any support for the Second Circuit's statement that there may be "considerable doubt" of a union's continuing majority status in cases involving "gradual hiring" of a majority of a predecessor's employees. To the contrary, precisely because the *Board* presumes continuing majority status as soon as the new employer reaches the "substantial and representative complement" date, there is no potential for "considerable doubt" that would provide a basis for distinguishing "rapid transition" from "gradual hiring" cases.[8]

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[8] The successor can rebut the presumption of continuing majority status only by demonstrating a good-faith doubt based upon objective considerations that the union lacks majority support. *Premium Foods, Inc. v. NLRB*, 260 NLRB 708, 714 (1982), *enf'd*, 709 F.2d 623 (9th Cir. 1983). The issue of the successor's

Nothing in *Fall River Dyeing* remotely suggests that the requirement of a bargaining demand should be conditioned upon the length of time it takes the successor to hire a "substantial and representative complement" of employees. Indeed, this Court made just the opposite statement: "Once the employer has concluded that it has reached the appropriate complement, *then*, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union already has made a demand for bargaining." *Fall River Dyeing*, 482 U.S. at 52-53 (emphasis added). Thus, even if "gradual hiring" or a hiatus in operations, as such, could ever be sufficient to create "considerable doubt" of a union's continuing majority status, this factor would be relevant only to the determination of successorship status; and that determination alone is insufficient to impose liability upon the

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potential "good-faith doubt" is not relevant to the question here: it arises only where the new employer is a successor *and* the union has made a bargaining demand. In fact, the factual context in which the issue of "good faith doubt" arises illustrates the practical problems with the Second Circuit's reasoning. Pursuant to decades of commonly understood labor relations practice, the successor has always communicated a refusal to bargain grounded in "good faith" doubt *as a response* to the union's bargaining demand. Put on notice of the employer's basis for its refusal to bargain, the union may or may not file an unfair labor practice charge. Under the Second Circuit's holding, however, when the employer with a "good faith" doubt in a "rapid transition" case makes unilateral changes in employment terms, the union that has failed to make the demand could file an unfair labor practice charge anyway, requiring the Board to investigate a charge that might not otherwise have been filed if the union had met its simple burden of notice to the employer.

successor for unilateral implementation of employment terms and conditions if there has been no bargaining demand.

Despite the Court's two-pronged test in *Fall River Dyeing*, the Second Circuit insisted that "*Fall River Dyeing* itself suggests the possibility that the composition of the successor's work force alone may in some circumstances be sufficient to trigger an employer's duty to bargain. . . . " [A-20]. In support of this statement, the Second Circuit relied upon the Supreme Court's observation in *Fall River Dyeing*, while describing the holding of *Burns*, that "[t]he '*triggering*' fact for the bargaining obligation [in *Burns*] was [the] composition of the successor's work force. . . . " [A-20] (quoting *Fall River Dyeing*, 482 U.S. at 46) (emphasis added). This Court's passing characterization of *Burns* in *Fall River Dyeing* is inapposite here. While it is true that the composition of the successor's work force may "trigger" the bargaining obligation when the "substantial and representative complement" date *happens* to come after the bargaining demand,[9] *Fall River Dyeing*, like *Burns*, plainly requires the concurrence of both events to hold a successor liable for its implementation of unilateral changes in terms and conditions of employment.

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[9] This is always the case when a union promptly takes the one simple step necessary to satisfy its easy burden of notice to the new employer.

3. Supreme Court review is necessary to prevent lower court confusion over the difference between the existence of a bargaining duty and a successor's breach of that duty that results in § 8(a)(5) liability.

The two-pronged test set forth in *Fall River Dyeing* is consistent with the traditional definition of a bargaining duty: it is an obligation to bargain with the union *when the union makes a demand*. Absent a demand, there cannot be either a "triggering" of the duty as this Court has always defined it or a breach of that duty.

In *Fall River Dyeing*, this Court held that a bargaining demand made before the successor reached the "substantial and representative complement" date was a "continuing" one. The Second Circuit's error lies in its apparent failure to recognize that a holding to the contrary in *Fall River Dyeing* would have precluded § 8(a)(5) liability: without a "continuing" bargaining demand there would have been no demand at all, and the employer's successorship status alone would have been insufficient to "trigger" the duty. The very fact that this Court addressed the "continuing" demand issue in *Fall River Dyeing* forecloses the Second Circuit's equation of an employer's mere successorship status to § 8(a)(5) liability for its unilateral implementation of employment terms.

The Unions in this case slept on their rights. Most unions in successorship cases – like the one in *Fall River Dyeing* – satisfy their easy burden of making a timely bargaining demand well before the successor begins hiring any employees. Because the issue arises in that typical context, it is not surprising that the Second Circuit

might confuse the "arising," "attachment," or "invocation" of a duty to bargain with successor's breach of that duty.

The mere existence of a bargaining duty, however, should not automatically result in the imposition of § 8(a)(5) liability for a successor's unilateral implementation of employment terms in the unusual case like this one in which the union fails to make a demand.[10] In *Wayne Convalescent Center*, 465 F.2d at 1042-43, for example, where an ordinary successor took over its predecessor's operations and immediately hired all of its predecessor's employees in May, 1970, the Sixth Circuit held that while the successor was "under a duty to bargain" at that time, it did not *breach* that duty by unilaterally imposing initial employment terms in June, 1970 because the union had not made a bargaining demand. Thus, the Sixth Circuit did not concern itself with whether a bargaining demand is necessary to the creation of a duty. Rather, while acknowledging the existence of a duty, it focused on the more relevant question of what makes a successor liable for breach of that duty. This approach is consistent with the two-pronged test in *Fall River Dyeing* and also the holding in *Burns*, where the Court spoke of a bargaining duty that "matured" before the union made its bargaining demand.

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[10] In the absence of Supreme Court review, this case will no longer be unusual. A union will be less diligent in notifying a successor of its desire for continuing representation. It will be free to hedge its bets. It can hold out to see what terms the successor will implement in the absence of a demand, then file an unfair labor practice charge and use the pendency of the charge as bargaining leverage in future negotiations.

The Court should use this case to clarify the law in this area in one of two ways: (1) by holding that a bargaining duty is not created at all in the first instance unless a union makes a bargaining demand; or (2) by holding that an ordinary successor, even in a "rapid transition," cannot be held liable under § 8(a)(5) for a *breach* of its duty to bargain when the union has failed to make a bargaining demand. Under either holding, the Court will reaffirm *Burns* and *Fall River Dyeing* in a way that provides clear guidance to successor employers and comports with decades of unchallenged labor law precedent.

4. Supreme Court review is necessary to prevent this case from disturbing the long-established expectations of employers and unions.

Management and labor have assumed since at least 1939 that § 8(a)(5) liability is conditioned upon the existence of a union's bargaining demand. *See Columbian Enamel & Stamping Co.*, 306 U.S. at 297 (holding that a union must demand bargaining before an employer can unlawfully "refuse" to bargain). An employer has no duty to request its employees to participate in collective bargaining and cannot unlawfully refuse to do something it has not been requested to do. *Id.* This simple balance of burdens is logical and easy for both employers and unions to understand and follow. It also fosters stability, requiring no guesswork by either party: a union must make a bargaining demand, and an employer must bargain with its employees' collective bargaining representative upon that demand. The Second Circuit's holding

disrupts this balance. With no analysis of the broader ramifications of its ruling, the Second Circuit decision changes a fundamental rule of federal labor law and radically shifts traditional burdens, all to relieve a union of its simple obligation to make a bargaining demand. In so ruling, the Second Circuit needlessly injected guesswork and instability into the process.

The requirement of a demand is easy to meet. A bargaining demand need not take any specific form; it need only give the employer notice that a demand is being made. *Steel City Transport, Inc. v. NLRB*, 389 F.2d 735, 739 (3rd Cir. 1968). The demand can be made quickly and inexpensively by letter, telegram, phone, or facsimile transmission. In contrast to this easy task, the Second Circuit's decision requires a "rapid transition" employer to *presume* that a demand has been made or risk violating § 8(a)(5). This presumption, however, may not reflect the actual wish of either the predecessor's employees or their unions. The fact that a successor has hired a majority of its predecessor's unionized employees is immaterial if the union no longer wants to represent the unit in the circumstances of the new employer. In this case, for example, BCA hired only two District 15 employees. [A-29-30]. A union may well find it cost-prohibitive to engage in bargaining for only two employees. This is not uncommon; unions often walk away from representation for a variety of business reasons. In fact, there is a substantial and well-settled body of federal labor law dealing with the waiver of bargaining rights by unions.

There was great potential for the unions to walk away in this case. BCA reduced by half an already small, balkanized ABN workforce of 102 employees represented

by no fewer than eleven unions, simultaneously announcing that it would require flexibility and cross-utilization and would implement different terms and conditions of employment. A union could easily have decided it was not worth the trouble to represent units with only a few employees. In fact, six of the eleven unions at ABN did not pursue representation of BCA employees.

The Second Circuit's decision requires a "rapid transition" successor to invite a union to bargain or remain in limbo, waiting to implement its own terms and conditions of employment while the union makes up its mind. This requirement is unprecedented, illogical, and unnecessary in view of the ease with which the union can satisfy its burden of making a demand.

5. Supreme Court review is necessary to prevent protracted, arbitrary and expensive line-drawing in future cases.

Although the Second Circuit rejected the Board's argument that BCA "ripened" into a perfectly clear successor, the inevitable effect of its decision is just as bad as a wholesale adoption of the Board's argument. The Second Circuit failed to define the boundary between its newly created categories of "gradual hire" and "rapid transition" successors. The dividing line between these now legally distinct kinds of successors could fall anywhere between a few days and several weeks. In the absence of Supreme Court review, the Second Circuit's decision will spawn considerable litigation to redefine the

rights and obligations of successors and their predecessors' unions.[11]

B. The Second Circuit's decision to enforce the Board's Order violates § 8(d) of the NLRA and conflicts with holdings of this Court and other federal courts of appeals that a successor cannot be bound to the terms of its predecessor's collective bargaining agreements.

The Second Circuit erroneously affirmed the Board's adoption of the ALJ's recommended order in its entirety, including a provision for "make whole" relief which states in relevant part that BCA must

> restore the status quo by rescinding, on request from the Unions, those unilateral changes put into effect on April 23, 1990, which were not previously announced; and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970).

[A-69]. The Board's "make whole" remedy in this case effectively binds BCA to the terms of its predecessor's collective bargaining agreements despite the Board's own finding that BCA repudiated ABN's contracts and announced its intention to operate under different terms and conditions of employment. [A-43]. As shown below,

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[11] *Burns* itself might even have been a "rapid transition" case because there was no hiatus in the predecessor's operations, and the successor hired its employees over the course of only a few weeks after winning the contract for its predecessor's security services. *See Burns*, 406 U.S. at 275.

the Second Circuit's enforcement of the Board's Order directly conflicts with Supreme Court and circuit caselaw.

The Board's Decision and Order stating that BCA "changed" employment terms on April 23 makes sense only if there was something in place to begin with on April 19.[12] Because BCA itself, according to the Board, did not establish any employment terms as of April 19 (with the exception of two previously announced terms relating to job flexibility and health insurance benefits), the Board's Decision and Order necessarily implies that "make whole" relief must be calculated by reference to the wage scales and other terms of the ABN collective bargaining agreements. The Board argued as much on appeal to the Second Circuit, and the inevitable effect of the Second Circuit's decision to uphold the Board's "make whole" award is that BCA must restore the terms and conditions of its predecessor's contracts *as if* these contract terms were in place on April 19.

Whatever employment conditions were in place on April 19, the Second Circuit cannot bind BCA to ABN's collective bargaining agreements without enforcing an order that exceeds the Board's authority in violation of

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[12] The Second Circuit's holding that BCA's April 23 announcement did not establish "initial" employment terms [A-22 n.5] conflicts with the Sixth Circuit's holding in *Wayne Convalescent Center*, 465 F.2d at 1041-42. In that case, the successor's bargaining duty attached in May, 1970; it unilaterally set its employment terms in late June, 1970; and the incumbent union made a bargaining demand on July 15, 1970. The Sixth Circuit found that the June employment terms were the successor's "initial" terms, and their announcement did not violate § 8(a)(5).

§ 8(d) of the NLRA and this Court's holding in *Burns*. The Board has authority to order a successor to bargain with a union or to submit to compliance proceedings to determine those initial employment terms and conditions that the successor has changed. *See, e.g., H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). In *Burns*, however, this Court ruled that even though a successor has a duty to bargain with an incumbent union, the Board cannot bind the successor to the terms of its predecessor's contracts and enter a "make whole" remedy that compensates employees for losses based on those contracts:

> Although [the ordinary successor] had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so . . . [i]t is difficult to understand how [an ordinary successor] could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to [taking over its predecessor's operation], no outstanding terms and conditions of employment from which a change could be inferred.

Burns, 406 U.S. at 294 (emphasis in original).

The Second Circuit's decision also creates a conflict in the circuits. In *NLRB v. Dent*, 534 F.2d 844 (9th Cir. 1976), the Ninth Circuit followed *Burns*'s mandate and held that a successor that initially paid its employees the wages required by its predecessor's contracts could not be ordered by the Board to "make whole" the employees after the successor unilaterally changed the wage scale two weeks later. "[T]he effect of the Board's . . . award, if

enforced, is to force the [successors] to abide by the wage provisions of their predecessor's contract." *Id.* at 847.[13]

As both this Court and the Ninth Circuit pointed out, § 8(d) of the NLRA guarantees that no party is required to agree to a proposal or to make a concession during collective bargaining. By forcing a successor to abide by its predecessor's contracts, the Board bargains for the parties in excess of its authority and binds a successor to terms it has already repudiated in violation of § 8(d). *Burns*, 406 U.S. at 283-84; *Dent*, 534 F.2d at 847.[14] This violates both the premise on which the NLRA is based, which is "private bargaining . . . without any official compulsion over the actual terms of the contract," *H.K.*

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[13] Prior to its holding in this case, the Second Circuit also followed *Burns*. In *Cooper Thermometer v. NLRB*, 376 F.2d 684 (2d Cir. 1967), the court held that an employer that relocated its plant and refused to reinstate employees at the new location under the employment terms in place at the prior location could not be forced to make backpay awards based on wage scales negotiated in bargaining agreements that covered the original location. If an employer like the one in *Cooper Thermometer* cannot be forced to honor its *own* expired contracts at another location, a successor like BCA certainly cannot be held to a different employer's contracts.

[14] Congress enacted § 8(d) in 1947 because it felt that "the present Board has gone very far . . . in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . ." H.R. Rep. No. 245, 80th Cong., 1st Sess., 19-20 (1947). *Burns* addressed continuing actions by the Board that violated the purpose of § 8(d). BCA respectfully submits that the current Board has done the same in this case by binding BCA to terms it did not negotiate, and even clearly repudiated. Court review is necessary to clarify the Board's authority in this regard.

Porter Co., 397 U.S. at 108, and the essence of *Burns*, which is that serious inequities stem from forcing an ordinary successor to honor its predecessor's contracts. *Burns*, 406 U.S. at 287-88.

The *Burns* holding prohibits Board orders that specifically bind a successor to its predecessor's contracts. The Board's Decision and Order violates *Burns* because it effectively requires BCA to honor ABN's contracts. Whether the Board does so explicitly or otherwise, it cannot negotiate for the parties in excess of its statutory authority, *H.K. Porter Co.*, 397 U.S. at 102, and in violation of the freedom of contract policy that § 8(d) was designed to enforce in the collective bargaining context. *Burns*, 406 U.S. at 285-86. This is especially true when, as in this case, the successor openly disavows any intent to honor the predecessor's collective bargaining agreement *and* announces that it will implement new and different employment terms. Without review, the Second Circuit's decision in this case will undermine the policy of § 8(d) as interpreted by this Court in *Burns*.

VI. CONCLUSION

For the foregoing reasons, BCA respectfully requests the Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 643,880 – August Term, 1995

(Argued: January 12, 1996 Decided: May 29, 1996)

Docket Nos. 95-4017, 95-4041

BANKNOTE CORPORATION OF AMERICA, INC.,

Petitioner – Cross-Respondent,

– v. –

NATIONAL LABOR RELATIONS BOARD,

Respondent – Cross-Petitioner.

Before:

VAN GRAAFEILAND, MINER, and CABRANES,

Circuit Judges.

Petition for review and cross-petition for enforcement of an order of the National Labor Relations Board finding that Banknote Corporation of America, Inc. engaged in unfair labor practices in connection with its acquisition of a high-security printing facility in early 1990. The Board concluded that BCA was, as of April 19, 1990, a legal successor to the facility's prior owner and therefore assumed a duty to recognize and bargain with

the charging party unions. Accordingly, BCA's institution of new terms and conditions of employment on April 23, without providing these unions with notice or an opportunity to bargain, constituted a violation of subsections 8(a)(1) and (a)(5) of the National Labor Relations Act.

BCA contends primarily that: (1) the historical bargaining units that the charging party unions sought to represent were not "appropriate" under BCA's operations, and BCA therefore had no duty to recognize or bargain with the unions; and (2) its institution of terms of and conditions of employment could not, in the absence of outstanding bargaining demands by the charging party unions, constitute an unlawful unilateral change in terms and conditions.

BCA's petition for review is denied; the NLRB's cross-petition for enforcement is granted.

LEWIS B. GARDNER, Houston, Texas (John P. Campbell, J. Richard Hammett, Brown McCarroll & Oaks Hartline, Houston, Texas, of counsel), *for petitioner – cross-respondent.*

DAVID FLEISCHER, Washington, D.C. (Frederick L. Feinstein, General Counsel, Linda Sher, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, National Labor Relations Board, of counsel), *for respondent-cross-petitioner.*

JOSÉ A. CABRANES, *Circuit Judge*:

Banknote Corporation of America, Inc. ("BCA") seeks review and the National Labor Relations Board ("NLRB" or "the Board") cross-petitions for enforcement of an order entered pursuant to subsections 8(a)(1) and (a)(5) of the National Labor Relations Act ("NLRA") (codified at 29 U.S.C. § 158(a)(1) and (a)(5)), concluding that BCA engaged in unfair labor practices. *Banknote Corp. of America, Inc.*, 315 N.L.R.B. 1041 (1994). The Board found that BCA, which acquired a high-security printing facility in Suffern, New York, on February 27, 1990, became a legal successor to the facility's prior owner as of April 19, 1990, when it hired nearly its full complement of workers from among the prior owner's work force. The Board found that on April 23, 1990, BCA changed certain terms and conditions of employment, without notice to or bargaining with the three charging party unions: the New York Lithographers & Photoengravers Union, # 1-P, Graphic Communications International Union ("Local 1-P"); District 15, International Association of Machinists & Aerospace Workers ("District 15"); and the Graphic Communications International Union, Local 119B-43B, New York ("Local 119B-43B"). *Id.* at 1044. The Board's order, issued on December 16, 1994, requires BCA to recognize and bargain with the three unions, to rescind the April 23 changes, and to make the affected employees whole for any losses incurred by virtue of the changes. *Id.* at 1044, 1047.

BCA petitions for review on the ground that two of the Board's findings – that the bargaining units that the charging party unions seek to represent in this case are "appropriate"; and that the announcement of terms and

conditions of employment on April 23 constituted an unlawful unilateral change – reflect improper application of legal principles and are contrary to the record evidence. We find merit in neither of BCA's contentions. We therefore deny BCA's petition for review and grant the General Counsel's cross-petition for enforcement.

I. FACTS

The following facts of record are drawn primarily from the Administrative Law Judge's decision of March 3, 1992, affirmed by a divided panel of the Board in a Decision and Order dated December 16, 1994.

This labor dispute stems from BCA's acquisition in early 1990 of a high-security printing facility located in Suffern, New York. The facility was formerly owned by American Banknote Company ("ABN"), one of the two major U.S. firms engaged in the printing of security documents (*e.g.*, stocks, bonds, visas, traveler's checks). In June 1989, ABN's competitor, United States Banknote Company ("USBN"), made a tender offer for ABN's parent company. The Justice Department raised antitrust objections to the proposed tender offer and required, as a condition of its approval of the transaction, the sale of an ABN printing facility to an independent third party. USBN entered into negotiations with a French security printing firm, François-Charles Oberthur Fiduciare ("FCO"), for the sale of ABN's Suffern facility. FCO formed an American subsidiary, BCA, to consummate the transaction. On December 15, 1989, USBN and BCA entered into a purchase agreement under which BCA

would acquire substantially all of ABN's assets at the facility.

Under the terms of the purchase agreement, BCA was required to elect to receive either a "closed" plant or an "operating" plant after USBN completed its tender offer for ABN's parent company. If BCA chose an operating plant, it would interview ABN employees and, within thirty days, provide USBN with a list of the employees it wished to hire. On January 9, 1990, despite the fact that USBN had not yet gained control of ABN's parent, BCA announced its intention to receive an operating plant. USBN completed its tender offer for ABN's parent company on February 27. The sale of the Suffern facility assets to BCA closed on the same day.

ABN's approximately 100 production employees were divided into eleven bargaining units to reflect the diversity of its work force, which included individuals with a variety of skills involved in the high-security printing process – designers, engravers, photoengravers, plate finishers, machinists, and so on. Because of a delay in USBN's acquisition of ABN's parent company, BCA officers were not able to gain access to the facility to interview employees as contemplated by the purchase agreement. Accordingly, on March 13, BCA supplied USBN with a list of those employees it wished to hire without having interviewed the employees. USBN "rejected" the employee list because it purportedly created difficulties under the seniority provisions of the collective bargaining agreements between ABN and the labor unions representing employees at the plant. When BCA officers began to discuss the rejection of the employee list with USBN officers, they discovered that

there had been a communication by the human resources director of ABN to union representatives at the facility on March 1 to the effect that "[FCO] has agreed to recognize the Unions who are party to collective bargaining agreements at the . . . plant and to be bound to the terms of the existing collect[ive] bargaining agreements." BCA retained labor counsel, who subsequently wrote a letter to union representatives indicating that the statements in the March 1 letter were not authorized, that BCA had made no commitment to recognize the unions or be bound by the collective bargaining agreements, and that BCA intended to "attempt to hire its initial work force from among the employees currently working at the . . . facility." BCA's president, Martin Ferenczi, met with union representatives on April 11, 1990. At that meeting, he announced that: (1) ABN would close its Suffern facility on April 13; (2) all ABN employees in Suffern would receive applications for employment with BCA; (3) BCA officers would conduct interviews with the former ABN employees on April 16 and 17; (4) the facility would reopen on April 19; and (5) BCA would not honor the collective bargaining agreements existing between ABN and the unions. Ferenczi also stated that BCA intended to introduce greater "flexibility" in operations at the plant, and that employees' existing health benefits would continue for a period of sixty days. He did not otherwise discuss the terms or conditions of employment.

As planned, BCA distributed employment applications to ABN employees prior to the closing of the plant. BCA interviewed 102 ABN employees on April 16 and 17, and extended offers of employment to fifty ABN production workers and four ABN supervisors, all of whom

began work on April 19. BCA also hired two maintenance workers not previously employed by ABN. On April 23, BCA announced certain terms and conditions of employment, with the result that as of that date all employees worked the same hours, participated in the same pension, vacation, and sick pay plans, received the same health and welfare benefits, and observed new company holidays. BCA also voluntarily recognized two of the eleven unions that had previously represented ABN employees.

Five unions filed charges against the company for violations of subsections § 8(a)(1) and (a)(5) of the NLRA, claiming that BCA had improperly failed to recognize and bargain with them prior to changing the terms and conditions of employment on April 23. The Board's regional enforcement counsel issued a consolidated complaint on behalf of all five unions in September 1990. In March 1991, the Board severed and withdrew complaints filed on behalf of two of the unions because each sought to represent only one employee. The Board filed amended complaints on behalf of the three remaining unions, Local 1-P, District 15, and Local 119B-43B. The case was heard before Administrative Law Judge D. Barry Morris on April 15-19, 1991. On March 3, 1992, the ALJ issued a decision and recommended order.

The ALJ found that, as of April 19, 1990, when BCA had hired nearly its full complement of employees from ABN's work force, BCA acquired a duty to bargain with the three charging party unions. The ALJ concluded that, despite the fact that BCA had hired only half of ABN's employees and had indicated its intent to introduce greater "flexibility" in its operations, BCA was a legal successor to ABN. As a prerequisite for the finding that

BCA was a legal successor with a duty to bargain with the charging party unions, the ALJ assessed whether the three units involved in the proceedings were "appropriate" bargaining units under BCA's operations. The ALJ found that BCA had failed to sustain its burden of demonstrating that the bargaining units the charging party unions sought to represent were inappropriate. As a result, BCA's duty to bargain attached no later than April 19. The duty to bargain carried with it a duty not to institute unilateral changes in the terms and conditions of employment without providing notice to or bargaining with the charging party unions. BCA therefore engaged in an unfair labor practice in announcing terms and conditions of employment on April 23 without consulting the unions

BCA, the Board's General Counsel, and Local 119B-43B filed exceptions to the ALJ's decision.[1] On December 16, 1994, a panel of the NLRB, by a vote of 2-1, affirmed the ALJ's rulings, findings, and conclusions and adopted the recommended order. *BCA*, 315 N.L.R.B. at 1041. The majority concluded that the bargaining units the charging party unions sought to represent remained "appropriate" under BCA's operations, and that, as of April 19, BCA was a legal successor with a duty to bargain before altering the terms and conditions of employment. In dissent, Member Stephens concluded

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[1] The General Counsel and Local 119-43B challenged the ALJ's conclusion that the BCA was not a "perfectly clear" successor to ABN – that is, that BCA had no duty to bargain with the unions prior to establishing its initial terms of employment. *See* discussion *infra* pp. 10-11, 12.

that changes instituted by BCA immediately upon its takeover of the plant – including the introduction of greater flexibility in the roles of the various production employees – rendered the historical bargaining units inappropriate. *Id.* at 1045.

On February 7, 1995, BCA filed a petition for review of the Board's decision and order, arguing that (1) the historical bargaining units that the charging party unions sought to represent were not appropriate under BCA's operations, and BCA therefore had no duty to recognize or bargain with the unions; and (2) BCA's announcement of terms and conditions of employment on April 23 did not constitute an unlawful unilateral change. The General Counsel cross-petitioned for enforcement.

II. DISCUSSION

An employer's collective bargaining obligation derives from subsection 8(a)(5) of the NLRA, which prohibits an employer from refusing "to bargain collectively with the representatives of his employees, subject to the provisions of [subsection 9(a) of the Act]." 29 U.S.C. § 158(a)(5). Subsection 9(a) identifies the representative designated by a majority of the employees in a unit appropriate for collective bargaining purposes as the exclusive bargaining representative of those employees. 29 U.S.C. § 159(a). By conjunctive application of these two subsections, the union designated by a majority of employees in an "appropriate" bargaining unit may compel the employer to negotiate as to the terms and conditions under which employees of that bargaining unit will work. In the instant case, the charging party unions had

collective bargaining relationships with ABN, not BCA. Nevertheless, it has long been held that under certain circumstances a "successor" employer may be required to presume that the representative of a bargaining unit continues to enjoy the support of a majority of the employees in that unit and to negotiate with the unit's bargaining representative.

Many of the principles governing the inquiry into whether and at what point an employer becomes a legal successor with a duty to recognize and bargain with an "incumbent" union were established in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), and *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). A finding of legal successorship first requires a finding of "substantial continuity" between the predecessor's enterprise and that of the successor. *Fall River Dyeing*, 482 U.S. at 43 (quotation marks omitted); *see Burns*, 406 U.S. at 280 n.4. Related to this inquiry is whether the bargaining unit that a union seeks to represent remains "appropriate" under the successor's operations. *See Burns*, 406 U.S. at 280. Subsections 8(a)(5) and 9(a) of the NLRA, read together, only require an employer to bargain with the representative of an "appropriate" bargaining unit.

More complicated is the question of *when* a legal successor's duty to bargain will attach. In *Burns*, the Court rejected the Board's rule that a successor must in all circumstances bargain with an incumbent union *before* instituting employment terms different from those prevailing under the predecessor's collective bargaining contract. The Court thus concluded that ordinarily a successor may set the initial terms and conditions of

employment – different from the substantive terms of the previously negotiated collective bargaining agreement – without bargaining. *Id.* at 281-86. The exception to this general rule, stated in dictum in *Burns* and developed by the Board and courts of appeals thereafter, is that a successor employer may be required to bargain as to the *initial* terms and conditions of employment when the successor makes it "perfectly clear" that it will retain its predecessor's work force and operate on substantially the same terms as the predecessor. *See id.* at 294-95; *International Ass'n of Machinists & Aerospace Workers*, 595 F. 2d 664, 671-74 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *Spruce Up Corp.*, 209 N.L.R.B. 194, 195 (1974), *enf'd per curiam on other grounds*, 529 F. 2d 516 (4th Cir. 1975); *see also Nazareth Regional High School v. NLRB*, 549 F. 2d 873, 881 (2d Cir. 1977). Even if an employer states its plan to retain employees from its predecessor's work force, its simultaneous announcement that it will operate on terms *different* from those of its predecessor raises the real possibility that the predecessor's employees will not wish to work on the new terms. *See Spruce Up*, 209 N.L.R.B. at 195. In such circumstances, it will not be "perfectly clear" prior to hiring what portion of the successor's employees will be drawn from the predecessor's work force. *See id.*

Although an ordinary successor – *i.e.*, one that does not make it "perfectly clear" that it intends to retain its predecessor's employees – may unilaterally set the *initial* terms and conditions of employment, the *Burns* Court concluded that a successor may ultimately acquire a duty to recognize and bargain with the representative of the predecessor's employees. In *Burns*, that duty was found to attach because a majority of the successor's employees

in an appropriate bargaining unit had been employed by the predecessor. 406 U.S. at 278-79; *see Saks & Co. v. NLRB*, 634 F. 2d 681, 685-86 (2d Cir. 1980).[2] In *Fall River Dyeing*, the Court addressed the question of when the determination of the presence of a majority in the successor's work force is to be made. The Court rejected the view that the determination of majority presence is appropriate only when the successor has hired the "full complement" of its employees, and instead adopted the Board's rule that the appropriate time to assess majority presence is when the successor has hired a "substantial and representative complement" of its employees. 482 U.S. at 47-52. *Fall River Dyeing* also makes clear, however, that "[t]he successor's duty to bargain at the 'substantial and representative complement' date is triggered *only when the union has made a bargaining demand.*" *Id.* at 52 (emphasis supplied).

In the instant case, the Board concluded that BCA was not a "perfectly clear" successor to ABN. Because BCA had communicated to ABN's unions in March and early April 1990 that it intended to make certain changes in the terms and conditions of employment, there existed a real question as to whether ABN's employees would

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[2] *Burns* actually contained conflicting language as to whether the proper inquiry required (1) a determination of whether a majority of the employees in the *successor's* bargaining unit had been employed by the predecessor; or (2) a determination of whether a majority of the employees in the *predecessor's* bargaining unit were hired by the successor. *Compare* 406 U.S. at 281 *with id.* at 278. We addressed this question in *Saks & Co.*, following other circuits in adopting the former approach. *See* 634 F.2d at 685-86.

accept the offered terms and enter into an employment relationship with BCA. Thus, it could not be "perfectly clear" from the outset that BCA would ultimately draw a majority of its employees in the bargaining units in question from ABN's work force. As of April 19, however, BCA had completed its hiring. Nearly all of BCA's employees were then former ABN employees. The Board concluded that, under these circumstances, BCA had a duty to bargain with the charging party unions as of April 19. The duty to bargain encompassed a duty not to impose unilateral changes in the terms and conditions of employment without notice to or bargaining with unions that are presumed to enjoy majority support among employees in a bargaining unit. The Board therefore found that BCA committed an unfair labor practice when it introduced terms and conditions of employment on April 23 without giving the unions prior notice and an opportunity to negotiate.

To sustain and enforce the Board's order, we must accept two disputed conclusions underlying the Board's holding that BCA acquired a duty to bargain as of April 19. First is the Board's factual determination that the three bargaining units that the charging party unions seek to represent remained "appropriate" bargaining units under the operational structure and practices introduced by BCA. Second is the legal conclusion – implicit in the Board's finding of a duty to bargain – that the charging party unions need not have made a demand that BCA bargain with them in order to preserve their right to challenge BCA's unilateral institution of terms and conditions of employment on April 23.

We review these conclusions in reverse order. We find no merit in BCA's argument that, in the absence of a demand by the charging party unions for recognition or bargaining, no collective bargaining relationship would have existed between BCA and the unions. We then consider BCA's argument that the Board's finding of unit appropriateness is unsupported by the record evidence. We reject this contention as well.

A. *Significance of Bargaining Demand in Ordinary Successorship Cases*

As previously noted, in *Fall River Dyeing* the Court addressed the question of when a successor's obligation to bargain with an "incumbent" union attaches. The Court upheld the Board's conclusion that a bargaining obligation attached in that case although the union had made a premature bargaining demand – that is, it had demanded bargaining *prior* to the successor's hiring of a substantial and representative complement of employees. The Board's conclusion was based on its finding that the union's bargaining demand was "continuing in nature." The Court reasoned as follows:

> [T]he Board's "continuing demand" rule is reasonable in the successorship situation. The successor's duty to bargain at the "substantial and representative complement" date is triggered only when the union has made a bargaining demand. Under the "continuing demand" rule, when a union has made a premature demand that has been rejected by the employer, this demand remains in force until the moment

> when the employer attains the "substantial and representative complement."

Id. at 52. Relying on this language, as well as similar pronouncements of courts of appeals, BCA argues that it could not have acquired a duty to bargain in the absence of any request for recognition or bargaining by the charging party unions. If no duty to bargain attached prior to BCA's introduction of new terms and conditions of employment on April 23, BCA's action could not have constituted an unlawful unilateral change.

We are unpersuaded. To be sure, several courts of appeals and Board cases applying *Fall River Dyeing* unequivocally state that the concurrence of two circumstances is required to trigger a bargaining obligation on the part of an "ordinary" (*i.e.*, not "perfectly clear") successor: (1) the hiring of a "substantial and representative complement" of employees, a majority of whom were employed by the predecessor; and (2) the existence of an outstanding demand by the union for recognition or bargaining. *See Nephi Rubber Prods. Corp. v. NLRB*, 976 F.2d 1361, 1365 n.6 (10th Cir. 1992) (determination of whether successor employer has duty to bargain requires analysis of whether successor has hired substantial and representative complement of employees at time of union's bargaining demand); *Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1232 (D.C. Cir. 1992) ("The presumption of majority support that creates a successor's duty to bargain arises . . . only when . . . the new employer has hired a 'substantial and representative complement' of its workforce and a majority of that workforce is composed of predecessor employees; and the incumbent union has, at some time, issued a valid bargaining demand to the new

employer."), *decision supplemented by* 312 N.L.R.B. 937 (1993), *enf'd*, 50 F.3d 1280 (4th Cir. 1995); *Briggs Plumbingware, Inc. v. NLRB*, 877 F. 2d 1282, 1286-87 (6th Cir. 1989) ("The concurrence of two events is necessary to obligate the successor employer to bargain with the union: the successor's employment of a 'substantial and representative complement' of the predecessor's employees and the union's demand for recognition."); *see also Capitol Steel & Iron Co.*, 299 N.L.R.B. 484, 496 (1990); *Royal Midtown Chrysler Plymouth, Inc.*, 296 N.L.R.B. 1039, 1040 (1989). As the Board stated in *Royal Midtown Chrysler Plymouth:*

> Successorship does not automatically carry with it the obligation to bargain with the union that represented the predecessor's employees. Nor does the fact that the union represents a majority of the successor's employees in an appropriate unit operate alone to invoke the bargaining obligation; and this is so even when the successor has attained a "substantial and representative complement" of employees. The bargaining obligation – albeit potentially present when successorship and representative complement are established – *must be triggered by a demand for recognition or bargaining.*

296 N.L.R.B. at 1040 (emphasis supplied).

Neither the ALJ nor the Board discussed the requirement of a bargaining demand in this case. In defending the Board's decision, the General Counsel does not argue that the charging party unions demanded recognition prior to the employer's April 23 action allegedly altering the terms and conditions of employment. Rather, the General Counsel argues that no bargaining demand was

required. First, the General Counsel contends that a successor has an obligation to bargain over terms and conditions of employment once it is clear that the majority of the employees in a bargaining unit were drawn from the predecessor's work force, regardless of whether the union has made a valid bargaining demand. Second, the General Counsel claims that no specific bargaining demand is required where an employer imposes, without notice, changes to the terms and conditions of employment. That is, where a union did not receive prior notice of possible changes as to a mandatory subject of collective bargaining, it cannot be thought to have waived its right to bargain as to such changes by failing to make a bargaining demand. Because we accept a variant of the first argument, we need not address the second.

Although the rule invoked by BCA here – that the concurrence of the hiring of a substantial and representative complement of employees, a majority of whom had been employed by the predecessor, and a bargaining demand is required to trigger an employer's duty to bargain – has been broadly stated, it developed within a specific factual context: where "there is a start-up period by the new employer while it gradually builds its operations and hires employees." *Fall River Dyeing*, 482 U.S. at 47. If an employer builds its work force gradually, assessing whether a majority of the successor's employees were drawn from the predecessor's work force once the employer has hired a substantial and representative complement – rather than when the employer has hired its full employee complement – serves the interest of the employees in being represented as soon as possible in the relationship with their new employer. *Id.* at 48. Requiring

the confluence of a majority presence in a substantial and representative complement of employees *and* a bargaining demand, among other things, eases the burden of uncertainty on the employer: "Once the employer has concluded that it has reached the appropriate complement, then, in order to determine whether its duty to bargain will be triggered, it has only to see whether the union already has made a demand for bargaining." *Id.* at 52-53.

While the two-pronged rule of *Fall River Dyeing* may be appropriate in a situation involving the staggered or gradual hiring of employees during a startup period, or even the hiring of employees after a prolonged delay between the closing and reopening of a business, we do not find it appropriate here. Where a successor rebuilds an operation over a period of time or where there is a hiatus between the closing and reopening of an enterprise, there may be considerable doubt as to whether a union that enjoyed the support of a majority of a predecessor's bargaining unit continues to do so under the successor's operation. Here, however, the employer hired its full complement of employees at once, shortly after the change in ownership of the business. Accordingly, the fact that the majority of the employees in each bargaining unit were former ABN employees was immediately clear to BCA. BCA could easily discern its obligation to presume that the representatives of ABN's employees continued to enjoy majority status. We see no reason to adopt BCA's for realistic approach where the requirement of a demand would have supplied it with no additional certainty regarding this obligation.

We therefore find those cases involving gradual hiring over a startup period or involving a hiatus in operations, in which courts and the Board have linked a determination of a duty to bargain with a bargaining demand, sufficiently distinguishable from the instant case to warrant application of a different rule here. *Cf. Nephi Rubber Prods.*, 976 F. 2d at 1365 (concluding that, after sixteen-month hiatus in operations, employee had hired substantial and representative complement of employees as of date of bargaining demand); *Williams Enters.*, 956 F.2d at 1230, 1232-34 (remanding to Board for determination of whether bargaining demand coincided with hiring of substantial and representative complement; successor immediately rehired nearly twenty percent of predecessor's employees and then "continually increased the size of its production staff" throughout next two months); *Briggs Plumbingware*, 877 F.2d at 1284, 1287 (requiring concurrence of bargaining demand and majority presence in substantial and representative complement where successor first hired some of predecessor's employees for pre-production work and began actual production with additional workers two months later); *Capitol Steel & Iron*, 299 N.L.R.B. at 485, 486 (examining whether successor to employer that ceased operations in January 1986 had duty to bargain, based on whether substantial and representative complement existed as of union's October 1987 bargaining demand). To the extent that other cases can be read to suggest that a bargaining demand is required even where the successor can immediately discern that a majority of its employees were employed by the predecessor, we simply disagree that *Fall River Dyeing* compels any such result. *Cf. NLRB v. Houston Bldg. Serv., Inc.*, 936

F.2d 178, 180 (5th Cir. 1991) (noting, in case where employer immediately hired all of predecessor's employees and union had made bargaining demand, that obligation to bargain arises where " 'a majority of the successor's employees had been employed by its predecessor,' " "assuming that the union has made a bargaining demand" (quoting *Fall River Dyeing*, 482 U.S. at 47)), *cert. denied*, 502 U.S. 1090 (1992); *Royal Midtown Chrysler Plymouth*, 296 N.L.R.B. at 1039 (holding that no bargaining obligation attached where successor hired three of four employees from predecessor's bargaining unit one week after change in ownership, but union made demand after predecessor's employees no longer formed majority in successor's bargaining unit). Indeed, *Fall River Dyeing* itself suggests the possibility that the composition of the successor's work force alone may in some circumstances be sufficient to trigger an employer's duty to bargain: in describing the holding of *Burns*, the *Fall River Dyeing* Court stated that in that case "[t]he 'triggering' fact for the bargaining obligation was [the] composition of the successor's work force" specifically, the fact that a majority of the successor's employees had previously been employed by the predecessor. *Fall River Dyeing*, 482 U.S. at 46.[3]

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[3] The union in *Burns* did make a bargaining demand prior to the successor's hiring of the predecessor's employees. Nevertheless, neither the *Burns* Court nor the *Fall River Dyeing* Court, in its exposition of *Burns*, appeared to attach legal significance to that fact.

We therefore conclude that the absence of a bargaining demand in this case – which involves neither a prolonged startup period and gradual or staggered hiring of employees nor a significant hiatus in operations, but rather, a rapid transition period with the immediate hiring of a full employee complement – does not preclude a finding of a duty to bargain on the part of BCA.[4] Assuming that the remaining prerequisites for successorship and a duty to bargain were met (a topic to which we shall return shortly), BCA's duty to bargain would have attached as of April 19, 1990, when BCA hired its employees. BCA was thereafter no longer free to act

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[4] In so holding, we do not fully accept the General Counsel's position on the question of when a bargaining demand is required to preserve a union's right to object to the unilateral imposition of terms and conditions of employees. That position appears to be that BCA, though not initially a "perfectly clear" successor, developed or ripened into one after hiring its full complement of employees, nearly all of whom were drawn from ABN's ranks. We agree with BCA that, absent indicia that an employer intends to retain its predecessor's employees on substantially the same terms, successorship is not perfectly clear. To apply that label to BCA on the theory that an employer can "ripen" into a perfectly clear successor is to ignore the legal significance that has attached to that term: A perfectly clear successor, unlike an ordinary successor, acquires a duty to bargain *prior* to hiring its predecessor's employees. Nevertheless, we take the General Counsel's point to be that, once it is plain to an employer that a majority of the employees in a bargaining unit are former employees of the predecessor, the employer is required to presume that a union's majority status continues, regardless of whether the union has made a bargaining demand. Where, as here, there is a rapid transition from one employer to another and the predecessor's employees are rehired almost immediately, we agree.

unilaterally with respect to mandatory subjects of collective bargaining and BCA's imposition of new terms and conditions of employment on April 23 was unlawful.[5]

We turn to BCA's remaining contentions. We address at length only BCA's argument that the ALJ and the Board erred in concluding that the bargaining units the charging party unions sought to represent remained "appropriate" under BCA's operations, finding the remainder of BCA's contentions to be insubstantial.

B. *Unit Appropriateness Under BCA's Operations*

BCA challenges on two grounds the determination that the bargaining units in question remained appropriate after BCA took over the plant. First, BCA contends that the Board improperly applied a rebuttable presumption in this case in favor of the appropriateness of historical bargaining units. BCA argues that the Board should instead have conducted the "community-of-interest"

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[5] Thus, we reject BCA's argument that the terms of employment imposed on April 23 were "initial" terms of employment. Under principles established by the Board and sanctioned over many years by courts of appeals, a successor is not held to the terms of its predecessor's contract, but to the terms on which it hired its employees. A successor must make clear, before its duty to bargain attaches, that it intends to vary its predecessor's terms; in so doing, it establishes its "initial" terms. *See International Ass'n of Machinists*, 595 F.2d at 674-75. We accept the conclusion of the ALJ, adopted by the Board, that BCA established only two "initial" terms here: that it would continue employee health benefits for sixty days, and that it would introduce greater "flexibility" in the workplace. *See BCA*, 315 N.L.R.B. at 1043 n.5; *id.* at 1049 (decision of ALJ).

analysis that it typically employs in determining whether a bargaining unit is appropriate; bargaining history is only one of several factors considered under that approach. Second, BCA suggests that it succeeded in overcoming the presumption in any event.

We examine each argument in turn.

1. *Board's Use of a Rebuttable Presumption in Favor of Historical Units*

In concluding that BCA had failed to demonstrate that the three bargaining units the charging party unions sought to represent were inappropriate, the Board reasoned as follows:

> [T]he Board has consistently held that long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies. The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate.

315 N.L.R.B. at 1043 (footnote omitted); *see Great Atlantic & Pacific Tea Co.*, 153 N.L.R.B. 1549, 1550 (1965); *Columbia Broadcasting Sys., Inc.*, 214 N.L.R.B. 637, 642-43 (1974). BCA contends that the proper inquiry into whether a bargaining unit remains appropriate under a successor employer involves application of the Board's "community-of-interest" test. *See Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134, 137 (1962); *NLRB v. Indianapolis Mack Sales & Serv.*, 802 F. 2d 280, 283-84 (7th Cir. 1986). Under that test, an assessment of unit appropriateness depends upon the degree to which a group of employees share a "community of interests" distinct from the interests of other

employees of the company. The degree to which employees share a community of interests is measured by a number of factors, including whether, in relation to other employees, they have different methods of compensation, hours of work, benefits, supervision, training and skills; if their contact with other employees is infrequent; if their work functions are not integrated with those of other employees; and if they have historically been part of a distinct bargaining unit. *Kalamazoo Paper Box*, 136 N.L.R.B. at 137; *see also Staten Island Univ. Hosp. v. NLRB*, 24 F. 3d 450, 455 (2d Cir. 1994). BCA contends that, in giving great weight to the "long-established bargaining relationships" in this case, the Board improperly elevated a single factor in the community-of-interest test – bargaining history – over all others, thereby creating a rebuttable presumption of the appropriateness of historical bargaining units and abdicating its duty under subsection 9(b) of the Act to decide "in each case" what "unit [is] appropriate for purposes of collective bargaining." 29 U.S.C. § 159(b).

We find BCA's argument unpersuasive. We have previously acknowledged the power of the Board to apply rebuttable presumptions regarding the appropriateness of bargaining units. Most recently, in *Staten Island University Hospital*, we found that power to be "beyond dispute," recognizing that the Board "is not required to exercise 'standardless discretion in each case' " and "has authority to 'resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.' " 24 F.3d at 456-57 (quoting *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991)).

A rule such as the one invoked by the Board here – favoring long-established bargaining relationships – is "reviewable for consistency with the Act, and for rationality." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978). The Board's invocation of a presumption in favor of historical bargaining units simply is not, as a general matter, inconsistent with the requirement of § 9(b) of the NLRA that the Board "decide in each case" the appropriateness of a bargaining unit.

BCA contends, however, that the Board's reliance on the presumption was improper in this case. Specifically, BCA claims that the application of a presumption in favor of historical bargaining units is not rational here, where the historical bargaining units have long gone unchallenged despite significant changes in the technology of the high-security printing industry.[6]

The rationality of applying a particular presumption need not be demonstrated by reliance on testimonial evidence in the case in which the Board invokes the presumption, *Big Y Foods, Inc. v. NLRB*, 651 F.2d 40, 46 (1st

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[6] BCA also argues that changes instituted since BCA's takeover of the printing facility render the application of a presumption in favor of the appropriateness of long-established bargaining units improper in this case. Evidence of changes instituted by BCA would not cast doubt upon the *rationality* of applying the presumption, but would demonstrate that the presumption has been overcome in this case. We therefore postpone scrutiny of this evidence. Even if we thought BCA's position relevant here, as will become clear, BCA fails to establish the factual predicate of this argument – namely that, upon its takeover of the plant, it immediately introduced a new operational structure, as a result of which functions were no longer divided along unit lines.

Cir. 1981) – indeed, such a requirement would undercut the ability of the NLRB to resolve issues of general applicability. Rather, the Board may draw upon its past experience in like cases in deciding whether to apply a presumption, and in such cases the application "is likely to be rational." *Id.; see Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-05 (1945). Nonetheless, if it were the case that BCA had introduced significant evidence that ABN's units had been rendered obsolete by industry shifts or developments at ABN, and the Board had applied the presumption in favor of long-established units in disregard of this evidence, we would not hesitate to find the application of the presumption irrational. Here, however, we find that BCA fails to carry the argument. The record does suggest that ABN underwent significant changes in structure over several decades, including shifting its operations in 1984 from a one central plant to three smaller plants, of which the Suffern facility was one. The record also suggests that at the time the Suffern facility was transferred to BCA, ABN employed at that facility a fraction of the workers that it had once employed at a central plant in the Bronx, New York: ABN's Bronx facility at one time had 2,000 workers; in early 1990, ABN's Suffern facility had approximately 100 production employees. Yet the record is virtually devoid of testimony or documentary evidence that the changes in structure and size in any way affected the working conditions, essential functions, and interaction of the employees of the different ABN units. BCA argues strenuously that a blurring of craft lines has over time rendered traditional unit designations in the printing industry obsolete. That may well be so, but absent evidence to that effect, BCA

cannot demonstrate that application of a presumption in favor of long-established bargaining relationships is inappropriate in this case. We discern no error in this aspect of the Board's decision and order.

2. *Board's Finding that BCA Failed To Overcome Presumption in Favor of Existing Bargaining Units*

BCA contends that even if the Board rationally applied here a presumption that long-established bargaining units remain appropriate, BCA has overcome that presumption. BCA claims that, upon reopening the plant, it significantly restructured the workplace. As a result, "[n]ot one of the [charging party] unions sought to represent a properly severable group of employees." Brief of Petitioner-Cross-Respondent at 31. BCA first emphasizes that it made clear prior to hiring its employees that it intended to develop a more "flexible" production process; it launched a program of "cross-utilization" almost immediately, as a result of which employees of the bargaining units in question performed functions largely indistinguishable from those performed by other BCA employees. Second, BCA claims that all BCA employees were paid on the same hourly scale, were covered by the same benefit plans, and worked the same hours.

In relying on the fact that all BCA employees had the same hours, wages, and benefits, BCA refers to the state of affairs *following* the April 23 institution of terms and conditions of employment. Like the Board and the ALJ, we decline to consider those changes in determining unit appropriateness. Based on the testimony of several ABN employees, the ALJ and the Board found that the only

changes BCA officers announced as terms and conditions of employment were that employee health benefits would be extended for a period of sixty days and that BCA intended to introduce greater flexibility in the plant's operations. 315 N.L.R.B. at 1043 n.5; *id.* at 1049 (decision of ALJ). We cannot say that this finding is contrary to the record evidence. The introduction of terms and conditions of employment on April 23 therefore cannot, as BCA claims, be cast as an introduction of "initial" terms and conditions, rather than as a change in the existing terms and conditions of employment.

We turn to BCA's argument that it restructured the workplace, integrating the functions of various employees and rendering the bargaining units in question – which had developed along strict craft lines – inappropriate. The Board rejected BCA's position, concluding that the employees in the three bargaining units at issue in this case "continued performing the same or substantially the same work as they had prior to the change in ownership, only occasionally filling in as needed on tasks otherwise assigned to employees in other bargaining units." 315 N.L.R.B. at 1043. An examination of the evidence as to each bargaining unit leads us to the conclusion that substantial evidence on the record as a whole supports the Board's finding.

a. *Local 1-P*

Local 1-P represented six photoengravers employed by ABN. ABN's photoengravers prepared film images of designs for transfer to plates used on the facility's printing presses. Three of the six workers represented by Local

I-P were rehired by BCA. BCA contends that it immediately expanded the duties of the photoengravers and submitted as evidence a chart suggesting that photoengravers' new duties included tasks of other engraving department employees – such as creating models, designing support material, and preparing lithographic plates. The testimony of two Local 1-P photoengravers, however, indicates that: (1) in interviews with BCA officers after the closing of the plant, the photoengravers were told that, if hired, they would perform largely the same functions under BCA as they had under ABN; (2) to the extent that they performed additional functions, they did not begin to do so until December 1990 or January 1991, several months after they were rehired by BCA. Although BCA's chart indicates that the employees Local 1-P sought to represent immediately performed the same tasks as other engraving department employees, it is directly contradicted by the testimony of these employees. The ALJ was entitled to credit that testimony, and the Board was entitled to accept it as demonstrating that any performance of duties across unit lines was, during the relevant time period, sporadic.

b. *District 15*

District 15 represented four ABN machinists. They were responsible for preparing plates for use on the printing presses, by "grinding" the back of the plates, bending the plates to the shape of the press, and punching holes in the plates for press clamps. In addition, the machinists maintained and repaired the presses, building parts when necessary. BCA hired two District 15

employees. BCA contends that other employees share machinists' duties: those who operate the presses are responsible for more maintenance than they had been under ABN, and others grind and bend plates, a task previously performed exclusively by machinists. Again, BCA's contention that many other employees perform tasks traditionally assigned to the machinists is contradicted by the relevant employee testimony. Both BCA machinists testified that they perform the same duties under BCA as they did under ABN. One machinist testified that, beginning in November or December 1990, he was trained to apply serial numbers to documents (such as visas). The testimony suggests that only the machinists grind plates and that others bend and punch plates only if the machinists are "overloaded."

c. *Local 119B-43B*

Local 119B-43B represented 13 workers engaged in finishing operations at ABN. ABN's finishing workers would count and examine printed sheets containing multiple documents, remove those with imperfections, and cut or otherwise separate the documents. Nine of the workers represented by Local 119B-43B were rehired by BCA. BCA contends that it immediately introduced changes so that former finishing workers of ABN – characterized, along with other employees in BCA's printing department, as "General Workers" – began to perform a variety of other tasks, and that other employees began to perform tasks formerly exclusively performed by the finishing workers. Specifically, according to BCA, finishing

workers now perform tasks further along in the production process (such as shrink-wrapping, packing, and storing products) as well as tasks performed earlier in the production process (such as "unwinding" – meaning unrolling metal printing plates from the spool on which they are shipped). As with Local 1-P and District 15 employees, the Local 119B-43B employees do not appear to have performed additional duties until several months after the reopening of the facility, or to have performed those duties regularly. Thus, a 119-43B employee testified that after five months she was trained to work on the unwinding machine and had done so on two or three occasions.

Based on our review of the record, we conclude that substantial evidence supports the Board's finding that employees in the units in question continued for some time to perform substantially the same work as they had prior to the change in ownership of the facility, only occasionally performing tasks assigned to employees in other bargaining units and being trained to perform other tasks several months after BCA reopened the plant. We are unpersuaded by the dissenting Board Member's suggestions that significant changes in the allocation tasks were "already in the works before [BCA] hired its employee complement" and that BCA "implemented these changes in job functions from the start." 315 N.L.R.B. at 1046. Even testimony by BCA supervisors and officers regarding instances of "cross-utilization" does not contradict the testimony of BCA employees that they were not trained to perform new functions until December 1990 or January 1991.

Nonetheless, we do not mean to suggest that the record would admit only of one finding. Some of BCA's documentary evidence on the distribution of work responsibilities under ABN and BCA at the facility appears to be corroborated by testimony of supervisors or officers of BCA. However, we are mindful that in reviewing a decision of the Board as to unit appropriateness, our task is not to substitute our judgment for that of the Board, but to determine whether the Board's conclusion is supported by substantial evidence on the record as a whole. We may not "displace the Board's choice between two fairly conflicting views." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

We recognize that, in upholding the Board's findings and conclusions, we sustain an agency order requiring BCA to recognize three unions that together claim to represent only one quarter of BCA's employees. As a result, BCA may encounter additional obstacles in its efforts to achieve further integration of its operations, if that is indeed its goal. In its decision, the Board alluded to these difficulties, recognizing that unit fragmentation may result from technological changes in the printing industry and emphasizing that the Board's unit clarification procedures provide a mechanism for "ensuring that bargaining units continue to reflect the reality of the workplace." 315 N.L.R.B. at 1044. We simply note that the outcome here was by no means inevitable. The Board's successorship doctrine recognizes the interest of a successor in altering the structure of an inefficient or moribund business beyond the confines of its predecessor's labor agreement. See *Fall River Dyeing*, 482 U.S. at 40. That interest is served by permitting an employer to set

the initial terms on which it will hire the predecessor's employees, not bound by the provisions of the predecessor's bargaining agreement. The ALJ and the Board majority were unable to discern on the part of BCA a concrete plan to restructure the printing facility, or evidence of implementation of such a plan prior to BCA's hiring of the ABN employees. It was fully within BCA's control to avoid the difficulty here: it could easily have made plain to the ABN employees, prior to hiring them, that it intended to integrate the employees into a more cohesive group by instituting new hours, benefits, and a new pay scale.

CONCLUSION

To summarize:

1. We find this case sufficiently distinguishable from *Fall River Dyeing* and its progeny to warrant the conclusion that the charging party unions need not have demanded recognition and bargaining to trigger BCA's duty to bargain in this case. Instead, the bargaining obligation was triggered by BCA's virtually immediate hiring of a full complement of employees, nearly all of whom were former ABN employees.

2. We likewise reject BCA's claim that the Board erred in concluding that the bargaining units the charging party unions seek to represent were inappropriate.

a. We find no error in the Board's application of a presumption in favor of the appropriateness of long-established bargaining units.

b. We conclude that the Board's finding that BCA failed to overcome this presumption was supported by substantial evidence on the record as a whole.

3. We have considered the remainder of BCA's arguments and find them to be without merit.

Accordingly, the petition for review is denied and the petition for cross-enforcement is granted.

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

BanknoteCorporation of America *and* Graphic Communications International Union, Local 119B-43B, New York *and* New York Lithographers & Photoengravers Union, #1-P, G.C.I.U. and District 15, International Association of Machinists & Aerospace Workers. Cases 2-CA-24304, 2-CA-24371, and 2-CA-24500

December 16, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On March 3, 1992, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent, the General Counsel, and Charging Party Graphic Communications International Union, Local 119B-43B, New York, filed exceptions and supporting briefs; the Respondent and the General Counsel filed answering briefs; and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge's finding that the Respondent is the legal successor to American Bank Note Company (ABN) within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and that the three historical units which the Charging Party Unions claim to represent constitute appropriate units for bargaining. Specifically, we find that the Respondent failed to show that the changes that it made in the operation of the plant rendered inappropriate the three longstanding units at issue here. We also agree with the judge's conclusion that the Respondent was not a "perfectly clear" successor to ABN within the meaning of *Burns*, and therefore was free to set initial terms and conditions of employment prior to its April 19, 1990 hiring of ABN's former employees. On that date, however, a bargaining obligation had attached with respect to any subsequent changes the Respondent wished to make in terms and conditions of employment. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment on about April 23, 1990, without affording the Charging Party Unions an opportunity to bargain about the changes.

I. FACTUAL BACKGROUND

On December 15, 1989, Francois-Charles Oberthur, through its subsidiary, Respondent Banknote Corporation of America (BCA), entered into a purchase agreement to acquire ABN's Ramapo facility in Suffern, New York. The

sale of ABN's Ramapo facility was completed on February 27, 1990,[1] and the Respondent began operations at the plant on April 19.

At the time of the acquisition, the Ramapo plant employed about 100 production employees who were represented in separate units by 11 unions, including the three Charging Party Unions.

On March 23, the Respondent sent a letter to all 11 unions stating that the Respondent intended to attempt to hire its initial work force from the employees currently working at the Ramapo facility, but that it was not making a commitment to recognize the Unions or be bound by their collective-bargaining agreements with ABN. This letter expressly disavowed a March 1 letter from ABN's director of human resources to Charging Party Lithographers Local 1-P stating that the Respondent intended to recognize the Unions at Ramapo and to be bound by the collective-bargaining agreements. We find that the March 23 letter adequately disavowed the comments attributed to ABN's management official. The March 23 letter stated that the ABN official was not an agent of BCA and had no authority to make such a commitment on behalf of BCA.

On April 11, the Respondent met with representatives of all the Unions and informed them that it would not honor the collective-bargaining agreements with ABN. Martin Ferenczi, the Respondent's president, advised the Unions' representatives that the Respondent intended to have a more flexible operation with respect to the jobs that employees would perform, and that it would

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[1] All dates are in 1990, unless otherwise stated.

cross-train employees so that they would be able to perform various functions. Ferenczi also told the Unions that health benefits presently in effect would continue for a period of 60 days.[2] Ferenczi did not discuss any other terms and conditions of employment during the April 11 meeting with the Unions.

On April 16, the Respondent interviewed 102 job applicants, all former ABN employees. All the employees who testified at the hearing were asked about the interviews. Their testimony was limited to the following.

Machinist Augustine Leone testified that the Respondent said nothing to him during his interview about vacation, sick leave, or holidays. He testified that flexibility was mentioned, and that he was told that employees would do things other than their own basic jobs. Machinist Jaroslaw Sawaryn testified that he was told that there would be job flexibility and that he would be asked to do different things. Machinist Shop Steward Salvatore Manitone said he was told nothing about benefits in the interview.

Platefinishers Robert Whelan and Gerard Lindsey recalled no discussion of holidays, vacation, sick leave, or other benefits during their interviews. Lindsey recalled that the interviewers mentioned that hours might be longer and that the Company would like to have more

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[2] The Respondent also announced that ABN would close on April 13, that applications would be given to all employees then working for ABN, and that the Respondent would be operational on April 19.

flexibility in terms of jobs. Photoengraver Luz Ruiz testified she was told during the interview that the salary and benefits would be the same.

The only employees hired by the Respondent were approximately 50 of these former ABN employees. They began working for the Respondent on April 19, along with four former ABN supervisors. These employees comprised the Respondent's entire work force.

On about April 23, the Respondent unilaterally changed the employees' terms and conditions of employment, with the result that as of that date all employees worked the same hours, participated in the same pension, vacation, and sick pay plans, received the same health and welfare benefits, and observed new company holidays. The three units at issue in this case encompass 14 employees. Graphic Communications Local 119-43B claims to represent nine employees classified as "general workers" who work in the printing department; Lithographers Local 1-P claims to represent three photoengravers who work in the engraving department; and Machinists District 15 claims to represent two other employees who work in the engraving department. The Respondent has recognized two other unions as the bargaining representatives of employees who are in the engraving department. These two recognized unions are Printers and Engravers Local 28-58, which represents 10 employees, and ALA Local 1, which represents 6 employees.

II. THE JUDGE'S DECISION

The judge found, and we agree, that after the Respondent took over the operation of the Ramapo facility from ABN, the same employees produced the same products, in the same plant, with the same equipment, in the same jobs, and by the same methods. He concluded, therefore, that the Respondent was the legal successor to ABN.

The judge properly noted that under *Burns*, supra, the Supreme Court made it clear that a successor is normally entitled to set the initial terms and conditions of employment on which it will hire the predecessor's employees. He further noted, however, that in cases where the successor plans to retain the predecessor's employees, and makes no mention of changes of employment conditions, the Board requires the successor to bargain concerning initial terms and conditions of employment.[3] The judge found that the only changes in terms and conditions of employment which were announced prior to hiring the employees were a desire for flexibility in terms of job functions, and that the health benefits in effect at that time with ABN would continue for a period of 60 days. The judge thus concluded that the Respondent was required to bargain concerning any changes in other terms and conditions of employment. Accordingly, the judge found that by unilaterally changing terms and conditions of employment on April 23, without affording the Unions a chance to

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[3] *Royal Vending Services*, 275 NLRB 1222, 1222-1228 (1985).

bargain about the changes, the Respondent violated Section 8(a)(5) and (1).

The Respondent had contended, inter alia, that it was not the legal successor to ABN because the three units involved in this case were no longer appropriate in view of changes the Respondent made in the organization of production processes and the duties of the employees. The Respondent argued that throughout its discussions with the Unions it announced its intention to introduce job flexibility and overlap, and that the duties of the employees in the three units at issue had changed significantly.

Although the judge acknowledged that under the Respondent's operation certain employees fill in for employees in other departments, he concluded that this was a result of the reduction in size of the work force, and that employees in the three units perform the same duties they previously performed for ABN.[4] The judge noted that while changes in working conditions may have been casually mentioned in some employee interviews, by no means were all or most of the employees specifically told before they were hired of any definite changes. In fact, the judge found that the employees were told that things would be about the same. The judge held that the three Charging Parties remained the bargaining

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[4] The judge also found that the aforementioned changes in employment terms and conditions were instituted after the Respondent's duty to bargain took effect, and therefore, the Respondent could not rely on the commonality of hours, benefits, and other terms to show that the three separate units in question were inappropriate.

representatives of the employees in each of the three respective units.

III. DISCUSSION

The General Counsel and the Charging Parties have excepted to the judge's failure to find that the Respondent is a "perfectly clear" successor to ABN within the meaning of Burns, supra, 406 U.S. at 294, 295, with an obligation to bargain with the Unions before setting initial terms of employment. We find no merit in these exceptions.

The Board held in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. on other grounds, 529 F.2d 516 (4th Cir. 1975), that even if a successor employer indicates a willingness to hire a majority of its employees from the ranks of the predecessor's employees, it is not "perfectly clear" that it will be a successor if, at the same time, it informs those employees that it does not intend to adopt the terms and conditions of employment which had prevailed under the predecessor. As the Board explained in *Spruce Up*:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court. The possibility that the old employees may not enter into an employment relationship with the new employer is a real one. 209 NLRB at 195.

That is the situation presented in this case. Although in its March 23 letter to the Unions the Respondent stated its "intention to attempt to hire its initial work force from among the employees currently working at the Ramapo facility," this letter also effectively announced that it would be instituting new terms and conditions of employment. Specifically, the Respondent's statements in the March 23 letter disavowing the notion that the Respondent had agreed to be bound by the terms and conditions of the ABN collective-bargaining agreements and declaring that the Respondent had "not made any such commitments" put the employees on notice that the Respondent would be making changes in the employment terms of the predecessor. In our view, the Respondent's statements in the letter convey to the predecessor's employees the message that the Respondent would not be adopting the predecessor's terms and conditions of employment. Thus, simultaneous with its stated intention to retain the predecessor's employees, the Respondent announced new terms and conditions of employment. Subsequently, specific anticipated changes were communicated to the Unions and to three of the prospective employees at their interviews. Under these circumstances, we conclude that the Respondent was not a "perfectly clear" successor under *Burns*, and that its bargaining obligation did not attach until it hired the employees on April 19.

Critical to a finding of successorship is a determination that the bargaining unit of the predecessor employer

remains appropriate for the successor employer.[5] In *Burns*, supra, the Supreme Court found that the successor employer (Bums) was obligated to bargain with the union that represented the employees of the predecessor (Wackenhut). The Court observed however: "It would be a wholly different case if the Board had determined that because Burns' operational structures and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." Id. at 280. The Board's longstanding policy is that "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective-bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988). As noted by the judge, the Board has consistently held that long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies.[6] The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. See *Columbia*

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[5] We agree with the judge, and our dissenting colleague does not dispute, that all of the other legal prerequisites for successorship are satisfied in this case. We also agree with the judge's finding that the only initial terms and conditions set by the Respondent were those announced to the Unions' representatives at the April 11 meeting. Contrary to our dissenting colleague, we find that the Respondent's inconsistent and generally vague statements to various employees in their prehire interviews were insufficient to provide notice of additional initial terms and conditions of employment.

[6] *Fraser & Johnston Co.*, 189 NLRB 142, 151 fn. 50 (1971), enf. granted in relevant part and denied in part on other grounds, 469 F.2d 1259 (9th Cir. 1972).

Broadcasting System, 214 NLRB 637, 642-643 (1974) ("compelling circumstances" must be shown before the Board will disturb a historical unit).

We find that the Respondent has not sustained its burden of showing that the Charging Parties' historical units no longer are appropriate separate units. The sketchy testimony of the six employees above, as well as several inconclusive documents purporting to show the switch in job duties, are the only evidence supporting the Respondent's contention that the three units are now inappropriate for bargaining. Contrary to our dissenting colleague's position, we do not find this proof to be sufficient to overturn well-established units, particularly where many of the changes in duties relied upon by the Respondent actually occurred after the bargaining obligation attached.

Careful review of the record strongly supports the judge's finding that the employees in these units continued performing the same or substantially the same work as they had prior to the change in ownership, only occasionally filling in as needed on tasks otherwise assigned to employees in other bargaining units. Such occasional or sporadic performance of duties across unit lines is insufficient to destroy the integrity of the Charging Parties' units at the facility.

When employed by ABN, the photoengravers represented by Lithographers Local 1-P were responsible for preparing film components and etching. Under BCA's work assignment system, they remain the only employees who perform these duties. The Respondent's engraving

division manager testified that the photoengravers "seldom" perform the additional tasks of creating models, designing support materials, and preparing litho plates.

The employees represented by the Machinists carry out precisely the same functions in the production process as they had under ABN, which generally involves shearing, grinding, and cutting. These employees have been given no new assignments by the Respondent, and employees in other units fill in to perform some of their functions only from time to time.

Although the employees represented by Graphic Communications Workers 119B-43B have been assigned to fill in on a wider scope of new duties, the fact remains that they continue to serve as the primary, and in some areas the only, employees performing their traditional duties.

The Respondent's contention that the intermittent or occasional performance of tasks across unit lines destroys the appropriateness of the Charging Parties' historical units is belied by its voluntary recognition of two of the other historical units, whose functions and duties the Respondent describes as "relatively intact and distinct." The evidence presented by the Respondent reveals that the employees in those two voluntarily recognized units also are performing new duties under the Respondent's operation. For example, employees represented by Printers and Engravers Local 28-58 now perform eight new functions not previously assigned to them by ABN. In addition, four of the tasks previously assigned exclusively to those employees are now occasionally performed by others. Thus, the introduction of new job

duties is not a basis for distinguishing between the two units recognized by the Respondent and the three units at issue.[7]

The evidence presented by the Respondent, as well as the employee testimony, demonstrates that the work of the employees in the three units, although less skilled than some of the work of the hand engravers in the voluntarily recognized Local 28-58 unit, continues to be assigned in much the same manner as it had been by ABN. Thus, we find that the functions of these units are also "relatively intact and distinct" despite the Respondent's introduction of some job flexibility.

In sum, the burden was on the Respondent to demonstrate that it had instituted such fundamental changes in the employees' duties that the three historical units no longer were separate, appropriate units. The Respondent failed to satisfy this heavy burden. Instead of producing detailed records concerning new and different functions being performed by the employees in the three units, the Respondent introduced nothing more than conclusory evidence of interchange, and virtually no evidence about the magnitude of that alleged interchange. Thus, from the testimony and other evidence presented by the Respondent, we can determine only that one or more employees in one traditional bargaining unit have on some occasion performed duties within the same general job function as employees in another traditional unit. In the face of such scant evidence, the presumed appropriateness of the

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[7] We recognize that Local 28-58 represents some employees who perform hand engraving, the most highly skilled work at the facility, and that this work continues to be reserved for them.

three traditional units represented by the Charging Parties was left undisturbed.

We are cognizant that this case arises in an industry that has traditionally been characterized by multiple, narrowly defined bargaining units and that the printing industry has undergone significant technological change in recent years. Such technological change, as well as the reductions in operations and staffing present in this case, may sometimes make cross-training and job flexibility both desirable and appropriate. The Board is keenly aware that unit fragmentation may result from these changes. Nonetheless, the Board's procedures for unit clarification provide a mechanism for ensuring that bargaining units continue to reflect the reality of the workplace. Here, however, the issue presented is whether the Respondent was a legal successor, including whether the bargaining units were appropriate, at a particular point in time, no later than April 19, when the former ABN employees began their employment with the Respondent. We are persuaded that the Respondent's job flexibility system, as described prior to the employees' commencement of work for the Respondent and as it operated when production began on April 19 under the Respondent's ownership, did not fundamentally alter the identity of the established bargaining units.[8] Accordingly, we conclude that the Respondent had a duty to bargain with the

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[8] We agree with the judge that this case is distinguishable from *P.S. Elliott Services*, 300 NLRB 1161 (1990), where, upon the acquisition of the business by the new owner, the employees became part of a highly integrated and centralized organization in which a single location unit could not be appropriate for bargaining.

Charging Parties concerning the April 23 changes in terms and conditions of employment and that its failure to do so violated Section 8(a)(5) and (1).[9]

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge and orders that the Respondent, Banknote Corporation of America, Suffern, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 16, 1994

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Dennis M. Devaney, Member

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Margaret A. Browning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER STEPHENS, dissenting in part:

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[9] The record shows that among the changes unilaterally implemented on April 23 was the institution of a new health and welfare benefits program for all employees. Thus, the Respondent did not act consistently with its pre-April 19 announcement to employees that the predecessor's health benefits would continue in effect for 60 days. Accordingly, we find that the Respondent's April 23 changes in health benefits also were unlawful.

Contrary to my colleagues in the majority, I find merit in the Respondent's exceptions to the judge's finding that the bargaining units are appropriate and that the Respondent is the legal successor to ABN.

Based on my examination of the record, I find that, even assuming the units in which the Charging Parties sought to represent the Respondent's employees were appropriate under ABN, they are not appropriate units under the Respondent.[1]

At Ramapo under ABN, 11 unions represented its 100 production employees in 11 separate units, and there was strict compartmentalization of functions and job duties. With rare exceptions, each unit was exclusively responsible for particular steps in the printing and engraving process. The Respondent's work force is approximately half the size of that employed by ABN at Ramapo. Unlike the five departments utilized by ABN, the Respondent has two departments – printing and engraving.

The Respondent has recognized two unions as the bargaining representatives of certain employees who are in the engraving department and whose functions remain relatively unchanged from what they were under ABN. These two recognized unions are Printers and Engravers Local 28-58, which represents 10 employees and ALA Local I, which represents 6 employees. The Respondent has designated all other employees in both departments as general workers and cross-trained them so that all of

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[1] I join my colleagues in the majority in finding that the Respondent is not a "perfectly clear" successor under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

them perform several new duties. General workers' duties in the printing department require minimal qualifications, as evidenced by the Respondent's frequent use of temporary employees for these positions. General workers in the engraving department are skilled or semi-skilled employees, but their skills are interchangeable and these employees are not restricted to one set of tasks.

The Respondent's documentary evidence was not specifically contradicted, and it was corroborated by the testimony of the employees. It shows that many tasks previously performed by employees from only one or at most two former ABN units are now performed by employees from as many as five former ABN bargaining units. In addition, employees in the three units claimed by the Charging Parties are performing job functions for the Respondent that differ markedly from the duties they performed for ABN.

Specifically with regard to the units at issue, under ABN, employees represented by Local 119B-43B were exclusively responsible for finishing work in the engraving department. That work is now performed by nearly all general worker employees, including many who were represented by other unions under ABN. In addition, the Respondent's employees formerly represented by Local 119B-43B now perform unwinding and rewinding duties which they did not do for ABN. These duties are also performed by general worker employees that Local 119B-43B is not seeking to represent. Further, the nine employees in the unit sought by Local 119B-43B also perform examining work, which is a duty that is shared by a number of other employees not included in the unit. In sum, the nine employees sought by Local 119B-43B are

functionally part of a group of 19 relatively unskilled general worker employees who are engaged in the end of the production process.

The three photoengravers sought to be represented in a separate unit by Local 1-P are part of a larger group of 14 engraving department employees who make printing plates by photographic processes such as operating cameras, making negatives, and stripping and assembling the negatives. Although these employees are skilled and semiskilled employees with a history of separate representation, they are not functionally distinct in the Respondent's operation. For example, employees represented by Local 28-58 also perform certain functions that the three photoengravers perform, i.e., creating models, designing support material, and preparing lithographic plates. The record shows that only the hand engravers and designers (employees not at issue with respect to this unit) possess such specialized skills that other engraving department employees could not perform their jobs.

Finally, Charging Party Machinists District 15 seeks to represent 2 of 14 engraving department general workers who move, repair, and maintain presses and other equipment, and who also perform plate-making duties. Unlike under ABN's operation, these two employees are no longer exclusively responsible for equipment maintenance and moving or for plate preparation functions. In addition to the two employees sought by the Machinists, the Respondent also uses employees previously represented by the Plate finishers Union (employees not in issue in this case) to operate machines in the engraving department and assist in the plate preparation process. Similarly, although the two employees

previously represented by the Machinists perform some maintenance functions in the printing department, they share that work with employees previously represented by other unions. Further, because their job functions are performed in two separate departments, the two employees sought by the Machinists are not supervised exclusively by one supervisor.

As is apparent from the factual recitation above, the predecessor employer was essentially a traditional printing and engraving operation with numerous highly specialized, separately represented crafts. The Respondent's operation, reflecting an entirely different organization of the work, features both an amalgamation of tasks – i.e, now one worker often performs tasks formerly split among workers in two or more crafts – and a splitting of tasks – i.e., tasks formerly performed by a single craft or classification of workers may now be performed both by a worker in one of the groups sought by the Charging Party Unions and by workers outside the groups sought be represented. In short, the units which the three Charging Party Unions now seek to represent are not clearly definable either by their place in the organizational structure of the plant or the work they do.

The Board does not lightly disturb long-established bargaining relationships, and historical units will not normally be found inappropriate simply because of minor changes in the successor employer's operation such as the addition of some new job duties for employees.[2] In

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[2] See, e.g., *Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991), enfd. mem. 940 F.2d 766 (3d Cir. 1991).

the unique circumstances presented here, however, contrary to my colleagues in the majority, I would find that, because of the Respondent's extensive and fundamental changes in the scope of the job tasks performed by its employees, that each of the three units no longer retains a distinct community of interest sufficient to support a determination that each unit is a separate appropriate unit for bargaining.[3]

Here, before it began operating the Ramapo facility, the Respondent announced to the employees and their unions its clear intention to operate without the functional distinctions that existed under ABN, and instead to utilize employee flexibility and interchangeability among jobs. These changes were already in the works before the Respondent hired its employee complement and the Respondent implemented these changes in job functions from the start, beginning with its hiring decisions and continuing through the commencement of operations.[4] Indeed, the Respondent was able to cut substantially the size of the work force, in part because of the elimination of the strict lines between crafts that had existed in the

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[3] In finding that the three units sought by the Charging Parties are not appropriate, I emphasize that I express no opinion on what may constitute an appropriate unit or units under the Respondent's operation.

[4] These changes are distinguishable from the April 23 changes in terms and conditions of employment, which were not implemented until after the Respondent commenced operations. As to the latter changes, I agree with the judge that the Respondent may not rely upon them to show that the three units in question are no longer appropriate.

ABN operation. These actions were taken contemporaneously with the beginning of the Respondent's operation of the Ramapo plant, and were consistent with what employees were told during their hiring interviews. Thus, the employees had no reason to believe that they would be working in the narrow crafts that they had under ABN; rather, the employees were put on notice that they would be performing duties different from those they had performed for the predecessor. As reconstituted under the Respondent's operation, the employees in the three units in question no longer function as distinct craft groups, and no longer have distinct communities of interest.

Because I have found that the functional distinctions that may once have justified recognizing separate bargaining units for the Charging Parties under ABN do not exist under the Respondent's operation of the Ramapo facility, I find that the three units sought by the Charging Parties are not appropriate.[5] Accordingly, I find in the peculiar circumstances presented here that the Respondent is not a successor with an obligation to bargain with these historical units, and that it thus did not violate Section 8(a)(5) and (1) by unilaterally implementing

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[5] Thus, this case differs markedly from the situation presented in *Phoenix Pipe & Tube Co.*, supra, where the Board found that the respondent company was a successor employer even though it had changed job classifications and requirements of craft employees. Unlike here, the employees in Phoenix Pipe continued to do substantially the same work that they did for the predecessor (with the addition of some cleaning and painting duties), and the respondent employer's plans to cross-train employees were speculative.

changes in employees' terms and conditions of employment on April 23. *P.S. Elliott Services*, 300 NLRB 1161 (1990).

Dated, Washington, D.C. December 16, 1994

James M. Stephens, Member

NATIONAL LABOR RELATIONS BOARD

Laura B. Sacks, Esq. and *David E. Leach, III, Esq.*, for the General Counsel.

J. Richard Hammett, Esq., Mary K. Williams, Esq., and *Katherine A. Ellis, Esq. (Verner, Liipfert, Berhard, McPherson & Hand)*, of Houston, Texas, for Respondent.

Moss K. Schenck, Esq., of New York, New York , for Local 1-P.

Valerie Marcus, Esq. (Vladeck, Waldman, Elias & Engelhard), New York, New York, for Local 119B.

William Rudis, of Stamford, Connecticut, for District 15.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case, was heard before me in New York City on April 15-19, 1991. Upon charges filed on April 13, May 18, and July 17, 1990[1], a consolidated complaint was issued on

[1] All dates refer to 1990 unless otherwise specified.

November 21 and amended on March 28, 1991, alleging that Banknote Corporation of America (BCA or Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by General Counsel and Respondent on July 8, 1991. A reply brief was filed by Respondent on August 15, 1991, and an answering brief was filed by General Counsel on September 4, 1991.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Suffern, New York, has been engaged in the production, engraving, and printing of security documents. Respondent admits that based on a projection of its operations since April 18, 1990, it annually sells and ships from its Suffern facility goods valued in excess of $50,000 to customers located outside the State of New York. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Graphic Communications International Union, Local

119B-43B, New York (Local 119B-43B), New York Lithographers & Photoengravers Union, #1-P, G.C.I.U. (Local 1-P), and District 15, International Association of Machinists & Aerospace Workers (District 15; (the Unions) are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The issues in this proceeding are:

1. Is Respondent the legal successor to American Bank Note Company (ABN)?

2. Did Respondent violate Section 8(a)(1) and (5) of the Act by setting new terms and conditions of employment without prior bargaining with the Unions?

B. *The Facts*

1. Background

Prior to the spring of 1989 there were two principal competitors in the securities printing industry, United States Banknote Company and ABN. ABN was a subsidiary of International Banknote Co., Inc. Around June 1989, United States Banknote made a tender offer for International Banknote. The United States Department of Justice, however, raised antitrust objections to the proposed tender offer and required the sale of at least one ABN security printing facility to a neutral third party. Consequently, on December 15, 1989, Francois-Charles

Oberthur (FCO), through its subsidiary, BCA, entered into a purchase agreement with United States Banknote to acquire substantially all of ABN's assets at its Ramapo facility in Suffern, New York.[2]

On January 9 BCA announced its intent to acquire the Ramapo facility as an operating plant. On February 26 Jean-Pierre Savare, chairman of the board of FCO, wrote the following letter to Malcolm Pritzker, attorney for FCO:[3]

> Confirming our telephone conversation of earlier this afternoon, please be advised that Francois-Charles Oberthur, through its USA subsidiary, Banknote Corporation of America, Inc., has decided to recognize the unions presently recognized at the American Bank Note plant in Suffern, New York ("Ramapo facility") and to continue the union contracts currently in force at the Ramapo facility.

The sale of assets of BCA closed on February 27. On March 1, Robert J. Tesoriero, director of human resources for ABN, advised Stanley Aslanian, president of Local 1-P, as follows:

> I have been advised that the Oberthur Company has agreed to recognize the Unions who

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[2] The acquisition of International Banknote by United States Banknote Co. was completed on February 27, 1990.

[3] There is some dispute as to whether Pritzker was in fact counsel to FCO. In any event, Savare testified that he did not authorize Pritzker to circulate the February 26 letter. In view of Campbell's March 23 letter, sent prior to any offers of employment having been made, I believe that I need not decide the question of Pritzker's status and authority.

> are party to collective bargaining agreements at the Ramapo plant and to be bound to the terms of the existing collective bargaining agreements.

On March 23 John P. Campbell, newly appointed counsel to FCO and BCA, wrote to Aslanian, as follows:

> It has come to our clients' attention that persons not authorized to speak on behalf of Oberthur or BCA have made statements to you to the effect that Oberthur or BCA have already agreed to recognize the unions at the Ramapo facility and [have] already agreed to be bound to the terms and conditions of the existing collective bargaining agreements at the facility. Any such statements were not authorized by Oberthur or BCA, and Oberthur and BCA hereby disavow them. No one has been or is authorized to speak on behalf of Oberthur or BCA on such matters except Oberthur or BCA. Oberthur and BCA have not made any such commitments.

The parties stipulated that an identical letter was submitted to all the Unions. The letter also noted that "it is BCA's intention to attempt to hire its initial workforce from among the employees currently working at the Ramapo facility."

On April 11 a meeting was held between representatives of BCA and the Unions. The meeting was chaired by Martin Ferenczi, president of BCA. Ferenczi announced that ABN would close on April 13, that applications would be given to all the employees then working at ABN, and that these employees would be interviewed by BCA on April 16 and 17. Ferenczi also announced that

BCA would be operational on April 19. In addition, Ferenczi reiterated that BCA would not honor the collective-bargaining agreements then existing between ABN and the Unions. Ferenczi testified that he stated at the meeting that BCA intended to introduce flexibility in terms of jobs and that health benefits presently in effect with ABN would continue for a period of 60 days. Ferenczi also testified that he did not discuss working hours, nor did he discuss any other benefits.

2. Interviews and employment at BCA

Augustine Leone testified that he was laid off by ABN on April 13, when the ABN operations ceased. On April 12 the ABN employees were handed applications and told to come to the plant for interviews by BCA on April 16. Leone testified that on April 16 only former employees of ABN were at the plant for the purpose of being interviewed. Leone was interviewed by Savare, Ferenczi, and Philip Hurwitz, vice president of BCA and formerly vice president and general manager of ABN. Leone testified that nothing was said to him about vacation, sick leave, or holidays. On April 18 Leone was called and told that he was hired and that he should report to work the following day. Leone testified that when he first began work at BCA his duties were the same as he had previously performed for ABN, and substantially the same products were produced, namely, stock certificates and securities.

Jaroslaw Sawaryn similarly testified that he was interviewed on April 16 and the persons being interviewed that day were all prior employees of ABN. Sawaryn testified that he was told at the interview that flexibility would be required in terms of jobs but that the benefits would be about the same as they were with ABN. Sawaryn also testified that he was told that vacations would be 1 week less and that operations were to begin on April 19. Sawaryn was informed by Hurwitz on April 18 that he was being hired and he started work on April 19. Sawaryn testified that when he began work with BCA his duties were substantially the same as they were at ABN. He further testified that as of December 1990, in addition to his other duties, he also worked on a numbering machine.

Robert Whelan testified that at the interview he was told that he would be performing the same duties with BCA that he did with ABN. He did not recall there having been any discussion about vacation time and testified that there was no mention of sick leave and holidays. Gerard Lindsey testified that during the interview there was no mention of holidays, vacations, sick leave, or other benefits. He testified, however, that the interviewers may have mentioned that the hours "might be longer" and that Sayare mentioned that the Company would like to have flexibility in terms of jobs. Luz Ruiz testified that she was told that the salary and benefits would be the same as they were at ABN. Salvatore Mantione testified that during the interview nothing was said about the benefits he would receive if he were hired by BCA.

Ferenczi testified that the interviews took place on April 16 and 17, that offers were made on April 18 and that the payroll started on April 19. He testified that 102 people were interviewed, all of whom had previously worked for ABN and who had been laid off by ABN on April 13. The parties stipulated, that except for two maintenance employees, the production employees at BCA all had previously been employees of ABN at the Ramapo plant. Ferenczi further testified that 50 production employees were initially hired and four former ABN supervisors were hired to be supervisors for BCA. Thus, John Volpe had been engraving division manager at ABN and he holds the same position at BCA. Stanley Golemba was assistant plant manager at ABN and is printing department manager at BCA. As previously mentioned, Philip Hurwitz had been vice president and general manager at ABN and is vice president and plant manager at BCA. Hurwitz testified that the processing of documents is the same at BCA as it was at ABN.

Discussion and Conclusions

1. Respondent is the legal successor of ABN

On February 27, 1990, Respondent purchased the assets of ABN. It had earlier announced its intent to acquire the Ramapo facility as an operating plant. The parties stipulated, that except for two maintenance employees, the BCA production employees had all previously been employees of ABN at the Ramapo plant. Four of the ABN supervisors continued as supervisors at BCA. Leone credibly testified that when he first began to work at BCA his duties were the same as they had been at ABN

and substantially the same products were produced, mainly stock certificates and securities. This testimony was corroborated by Sawaryn. In addition, Hurwitz, who had been vice president and general manager at ABN and is vice president and plant manager at BCA, testified that the processing of documents at BCA is the same [as] it was at ABN.

The Board has evolved a set of criteria to determine whether legal successorship exists. The relevant questions include:

> (1) whether there has been a substantial continuity of the same business operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services. *J.P. Mfg.*, 194 NLRB 965, 968 (1972); *Band-Age, Inc.*, 217 NLRB 449, 452-53 (1975), enfd. 534 F.2d 1 (lst Cir. 1976).

Based on the above, Respondent clearly meets the criteria necessary for it to be deemed the legal successor of ABN.

2. Duty to bargain

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court made it clear that a successor is entitled to set the initial terms of employment on which it will hire the predecessor's employees. However, in cases

where the successor plans to retain the old employees, and makes no mention of changes in employment conditions, the Board has held that the successor must bargain concerning initial terms and conditions of employment. *Royal Vending Services*, 275 NLRB 1222, 1227-1228 (1985).

The complaint alleges that on April 23, 1990, BCA imposed a new set of terms and conditions of employment which, inter alia, changed employees' hours of employment, health and welfare benefits, holidays, pension benefits, and vacation leave. These changes were made without the Unions being afforded an opportunity to negotiate and bargain with respect to such changes. At the meeting held on April 11, Ferenczi testified that he stated that BCA intended to introduce flexibility in terms of jobs and that health benefits presently in effect with ABN would continue for a period of 60 days. Ferenczi also testified that at that meeting he did not discuss working hours nor did he discuss any other benefits. Leone testified that at his interview on April 16 nothing was said to him about vacations, sick leave, or holidays. Sawaryn testified that he was told at the interview that flexibility would be required in terms of jobs but that the benefits would be substantially the same as they were with ABN. Similarly, Whelan and Lindsey testified that during their interviews there was no mention of holidays, vacations, sick leave, or other terms of employment. However, Lindsey testified that the interviewers may have mentioned that the hours "might" be longer and that Sayare stated that the Company would like to have flexibility in terms of jobs. In addition, Ruiz testified that benefits would be the same as they were at ABN and Montione testified that during the interview nothing was

said about the benefits he would receive if he were hired by BCA.

Based on the above, I find that the only changes in terms of employment, which were announced prior to hiring the employees, were a desire for flexibility in terms of jobs and that the health benefits presently in effect with ABN would continue for a period of 60 days. No mention of changes in other employment conditions was made. In accordance with the cases cited above, Respondent would be required to bargain concerning any changes in the other terms and conditions of employment.

3. Appropriate bargaining units

Respondent argues that because of changes it made in the duties of the employees, the units involved in this proceeding are no longer appropriate bargaining units. The Board has consistently held that long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies. *Fraser & Johnston Co.*, 189 NLRB 142, 151 fn. 50 (1971), enf. granted in part and denied in part on other grounds 469 F.2d 1259 (9th Cir. 1972). Sawaryn testified that his duties at BCA were substantially the same as they were at ABN, although, as of December 1990, he also worked on a numbering machine. Similarly, Leone testified that his duties at BCA were the same as they were at ABN, except that he also does "cross-over work between the engraving division and the mechanical division." Whelan testified that he performed the same duties at BCA as he did at ABN, except that in December 1990 he received some training

in other departments and at that time he did some filling in for employees in other departments. Thus, the evidence establishes that employees in the units involved in this proceeding perform the duties they previously performed for ABN and on occasions certain employees fill in for others as a result of the reduction in size of the Ramapo plant work force. As the Board stated in *Fraser & Johnson Co.*, id., "divided production and maintenance units are not uncommon and are certainly not inappropriate per se." While more inclusive units may also be "appropriate," it does not follow that the units in this proceeding are therefore "inappropriate." As the Board held in *Parsons Investment Co.*, 152 NLRB 192, 193 fn. 1 (1965):

> There is nothing in the statute which requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit; the Act requires only that the unit be "appropriate." [Citation omitted.]

See also *Federal Electric Corp.*, 157 NLRB 1130, 1132-1133 (1966); *Texas Electric Service Co.*, 261 NLRB 1455 fn. 1 (1982).

In support of its position Respondent has cited *P.S. Elliott Services*, 300 NLRB 1161 (1990). I believe, however, that that case is distinguishable. In *Elliott*, respondent, which was in the business of providing cleaning services at a number of buildings, took over the cleaning services at the Brisbane building. Employees at all the locations were commonly supervised out of a central office and all personnel matters were handled exclusively at the central office. In addition, employee interchange between the

buildings was regular and frequent. Under such circumstances, the Board found that the employees at the Brisbane building did not by themselves constitute an appropriate bargaining unit. In the instant proceeding, however, except for the two previously announced changes, all the other changes in the terms and conditions of employment took place after the obligation to bargain attached. Thus, while Respondent argues that all of its employees work the same hours, have the same lunch-break, participate in the same pension, vacation, and sick pay plans, wear the same uniforms, and observe new company holidays, these changes were instituted after Respondent's duty to bargain took effect. See *Alondra Nursing Home*, 242 NLRB 595, 598 fn. 12 (1979).

I find, therefore, that the units involved in this proceeding constitute appropriate units for collective bargaining.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to negotiate with the Unions with respect to certain changes in terms and conditions of employment, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

On April 23, 1990, Respondent imposed a new set of terms and conditions of employment without having afforded the Unions an opportunity to negotiate and bargain with respect to the changes. Except for announcing that it intended to introduce flexibility in terms of jobs and that health benefits in effect with ABN would continue for a period of 60 days, Respondent did not announce any other changes in employment conditions when it offered jobs to the employees. Accordingly, having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing certain terms and conditions of employment without notice to, and bargaining with, the Unions, I shall order Respondent to restore the status quo by rescinding, on request from the Unions, those unilateral changes put into effect on April 23, 1990, which were not previously announced; and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as

prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Banknote Corporation of America, Suffern, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment without prior notice to or bargaining with the Unions, as the exclusive representatives of the employees in the below-described bargaining units.

(b) Refusing to bargain with Graphic Communications International Union, Local 119B-43B, New York, in the following appropriate unit:

> The unit of employees set forth in the Shop Rules and Wage Scales Contract between Local 119B-43B and Printers League Section Association of the Graphic Arts, Inc.

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[4] Under *New Horizons*, interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Refusing to bargain with New York Lithographers & Photoengraphers Union, #1-P, G.C.I.U., in the following appropriate unit:

> All journey persons and apprentice photoengravers, excluding all other employees, guards, professional employees and supervisors as defined in the Act.

(d) Refusing to bargain with District 15, International Association of Machinists & Aerospace Workers, in the following appropriate unit:

> All machinists, excluding all other employees, guards, professional employees and supervisors as defined in the Act.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively with the Unions, as the exclusive representatives of the employees in the aforesaid appropriate units, with respect to rates of pay, hours, and other terms of employment and, if understandings are reached, embody such understandings in signed agreements.

(b) On request of the Unions, rescind the unilateral changes instituted on April 23, 1990, which were not previously announced, and make affected employees whole for losses they incurred by virtue of the unilateral changes, with interest as prescribed in the remedy section above.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts owing under the terms of this Order.

(d) Post at its facility in Suffern, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. March 3, 1992

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change the terms and conditions of employment for bargaining unit employees, without prior notice to or bargaining with the Unions, as the exclusive representatives of the employees in the below-described bargaining units.

WE WILL NOT refuse to bargain with Graphic Communications International Union, Local 119B-43B, New York, in the following appropriate unit:

> The unit employees set forth in the Shop Rules and Wage Scales Contract between Local 119B-43B and Printers League Section Association of the Graphic Arts, Inc.

WE WILL NOT refuse to bargain with New York Lithographers & Photoengravers Union, #1-P, G.C.I.U., in the following appropriate unit:

> All journey persons and apprentice photoengravers, excluding all other employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with District 15, International Association of Machinists & Aerospace Workers, in the following appropriate unit:

All machinists, excluding all other employees, guards, professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with the Unions, as the exclusive representatives of the employees in the aforesaid appropriate units, with respect to rates of pay, hours, and other terms of employment and, if understandings are reached, embody such understandings in signed agreements.

WE WILL, on request of the Unions, rescind the unilateral changes instituted on April 23, 1990, which were not previously announced, and make affected employees whole for losses they incurred by virtue of the unilateral changes, with interest.

BANKNOTE CORPORATION OF AMERICA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of August, one thousand nine hundred and ninety-six.

BANKNOTE CORPORATION OF AMERICA, INC.

Petitioner-Cross-Respondent,

v

Dkt. No: 95-4017

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the petitioner Banknote Corp.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: _____

Beth J. Meador,
Administrative Attorney

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Where an employer remains in business, but its contract with a union expires, most contractual terms and conditions of employment survive, not by virtue of the contract, but by operation of law. *Litton Financial Printing v. NLRB*, 501 U.S. 190, 199 (1991). The same principle applies when the contract is no longer in effect because the contracting employer is replaced by a successor who is obligated to bargain but not to adopt the contract. *Blitz Maintenance, Inc.*, 297 NLRB 1005, 1008-09 (1990), enforced mem., 135 LRRM 3272 (6th Cir. 1990). Where some changes are announced before the bargaining obligation attaches, but others are made later without prior announcement, the foregoing principle applies to the latter. *Id.* at 1005 n.2.

[Page 24]

. . . .

As shown above, pp. 19-28, BCA became a "perfectly clear" successor on April 19, 1990, when it hired a work force consisting almost entirely of ABN employees. Accordingly, even in the absence of a bargaining demand, it was not entitled to make unilateral changes four days later.

[Page 39].

Supreme Court, U.S.
FILED
JAN 6 1997
CLERK

No. 96-706

In the Supreme Court of the United States

OCTOBER TERM, 1996

BANKNOTE CORPORATION OF AMERICA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WALTER DELLINGER
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Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether petitioner, a successor employer which began operations with a full workforce comprised primarily of employees who had worked for the predecessor employer, violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by subsequently changing the employees' terms and conditions of employment without bargaining with the unions representing those employees.

2. Whether the Board exceeded its statutory authority in ordering make-whole relief for the violation in this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-706

BANKNOTE CORPORATION OF AMERICA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 84 F.3d 637. The decision and order of the National Labor Relations Board (Pet. App. 35-56), and the decision of the administrative law judge (Pet. App. 56-74), are reported at 315 N.L.R.B. 1041.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1996. A petition for rehearing was denied on August 1, 1996. Pet. App. 75-76. The petition for

a writ of certiorari was filed on October 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until 1990, American Banknote Company (ABN) owned a high-security printing plant in Suffern, New York. Pet. App. 4.[1] Effective February 27, 1990, petitioner acquired the New York plant from ABN. *Id.* at 3. At the time of the acquisition, ABN employed 100 production workers at the plant, with 11 unions representing 11 separate bargaining units. *Id.* at 5, 37. On March 23, petitioner sent a letter to the unions stating that it intended to hire its initial workforce from the pool of employees then working at the plant, but that it was not committing itself to recognizing the unions or to honoring their existing collective bargaining agreements with ABN. *Id.* at 6, 37.

On April 11, 1990, petitioner's president met with representatives of all of the unions. Pet. App. 37. At that meeting, the president informed the unions that ABN would close the plant on April 13, that all former employees would receive applications for employment with petitioner, that petitioner's officials would interview former ABN employees on April 16 and 17, and that petitioner would reopen the plant on April 19. *Id.* at 6. The president also told the union representatives that petitioner intended to establish a more "flexible" operation at the plant, that employees would receive cross-training, and that their

[1] "High-security" printing involves the production of such items as stocks, bonds, visas and traveler's checks. Pet. App. 4.

existing health benefits would be continued for 60 days. *Id.* at 6, 37-38. The president did not otherwise discuss the employees' terms and conditions of employment at the April 11 meeting. *Id.* at 6.

Petitioner interviewed former ABN employees as scheduled on April 16 and 17, 1990, and reopened the plant on April 19 with a full workforce of 52 production and maintenance employees, 50 of whom were former ABN employees. Pet. App. 6-7. On April 23, without first bargaining with the unions, petitioner unilaterally changed the employees' terms and conditions of employment. Thereafter, all of the employees were required to work the same hours, participate in the same pension, vacation, and sick-pay plans, receive the same health and welfare benefits, and observe new company holidays. *Id.* at 7.

2. Acting on unfair labor practice charges filed by three of the 11 unions that represented the former ABN employees (the Unions),[2] the General Counsel of the National Labor Relations Board (Board) issued a complaint against petitioner, alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(5) and (1), by unilaterally changing the employees' terms and conditions of employment on April 23, 1990, without first bargaining with the Unions. Pet. App. 7.

The Board, affirming the findings and conclusions of the administrative law judge (Pet. App. 56-72),

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[2] The three complaining unions were New York Lithographers & Photoengravers Union, #1-P, Graphic Communications International Union; District 15, International Association of Machinists & Aerospace Workers; and Graphic Communications International Union, Local 119B-43B, New York. Pet. App. 3.

sustained the General Counsel's complaint. *Id.* at 35-49. To remedy petitioner's unfair labor practice, the Board ordered it, among other things, to rescind, on the Unions' request, the unilateral changes that it implemented on April 23, 1990, to "make affected employees whole" for any losses suffered as a result of the unilateral changes, and to bargain with the Unions upon their request. Pet. App. 49, 70-71.

3. The court of appeals enforced the Board's order. Pet. App. 1-34. The court noted that "it has long been held that under certain circumstances a 'successor' employer may be required to presume that the representative of a bargaining unit continues to enjoy the support of a majority of the employees in that unit and to negotiate with the unit's bargaining representative." *Id.* at 10. Although an ordinary successor "may unilaterally set the *initial* terms and conditions of employment," thereafter the successor must "recognize and bargain with the representative of the predecessor's employees." *Id.* at 11.

The court rejected petitioner's argument that it had no duty to bargain in the absence of a bargaining demand by the Unions. Pet. App. 33. The court reasoned that, because this case involves "a rapid transition period with the immediate hiring of a full employee complement," rather than a gradual transition, "the absence of a bargaining demand * * * does not preclude a finding of a duty to bargain on the part of [petitioner]." *Id.* at 21. The court explained that a prolonged transition period may create "considerable doubt as to whether a union that enjoyed the support of a majority of a predecessor's bargaining unit continues to do so under the successor's operation." *Id.* at 18. Here, by contrast,

because petitioner "hired its full complement of employees at once, shortly after the change in ownership of the business * * * the fact that the majority of the employees in each bargaining unit were former ABN employees was immediately clear to [petitioner]." *Ibid.* Given the rapid transition from ABN's to petitioner's ownership, and petitioner's employment of a workforce comprised primarily of ABN's employees, petitioner had no basis for assuming that the Unions no longer represented the employees' interests. Because petitioner could "easily discern its obligation" to bargain with the Unions, the court concluded that there was "no reason to adopt [petitioner's] formalistic [see 84 F.3d at 646, misquoted at Pet. App. 18] approach" of awaiting a bargaining demand, because "the requirement of a [bargaining] demand would have supplied it with no additional certainty regarding this obligation." *Ibid.*

ARGUMENT

The decision below is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), obligates an employer "to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a), 29 U.S.C. 159(a), provides, in relevant part, that a union "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" is the "exclusive representative[] of all the employees in such unit."

An employer's legal obligation to bargain with the union that represents its employees may extend to that employer's "successor." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27 (1987); *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972). A new employer is a successor to the former employer if there is "substantial continuity" between the employers' respective enterprises. *Fall River Dyeing*, 482 U.S. at 43; *Burns*, 406 U.S. at 280 & n.4. The " 'triggering' fact for the bargaining obligation" is "th[e] composition of the successor's work force," *Fall River Dyeing*, 482 U.S. at 46; thus, if a majority of the successor's employees were employed by the predecessor, the successor is obligated to bargain with the union that represents those employees, provided that the bargaining unit continues to be an appropriate one under the successor's operations. *Id.* at 46 & n.12; *Burns*, 406 U.S. at 278-279, 280. A successor employer is not legally bound to honor the predecessor's labor contract, and, as a general rule, is free to set the initial terms upon which it will hire the predecessor's employees. *Burns*, 406 U.S. at 291, 294.[3] Having unilaterally set initial terms, however, the successor is obligated to bargain with the union before making further changes to the employees' terms and conditions of employment. See *id.* at 295.

Applying those settled principles, the court of appeals affirmed the Board's finding that petitioner was a legal successor to ABN, Pet. App. 10-13, 36, and that conclusion is not disputed here. Petitioner was

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[3] Only a so-called "perfectly clear" successor—*i.e.*, a successor who had made it "perfectly clear" from the outset that it plans to retain all (or, perhaps, substantially all) of the predecessor's employees, see *Burns*, 406 U.S. at 294-295—is not free unilaterally to set initial terms.

free unilaterally to set initial terms on which it would hire the former ABN employees, and it did so. *Id.* at 6. However, as the court of appeals correctly held, *id.* at 21-22, petitioner violated Section 8(a)(5) of the Act when, on April 23, 1990, it made further changes in the employees' terms and conditions of employment without bargaining with the Unions. The court of appeals observed that, under this Court's precedents, "the composition of the successor's work force alone may in some circumstances be sufficient to trigger an employer's duty to bargain." Pet. App. 20 (citing *Fall River Dyeing*, 482 U.S. at 46). Applying that principle here, the court held that petitioner's duty to bargain "attached as of April 19, 1990, when [petitioner] hired its employees. [Petitioner] was thereafter no longer free to act unilaterally with respect to mandatory subjects of collective bargaining, and [petitioner's] imposition of new terms and conditions of employment on April 23 was unlawful." Pet. App. 21-22.

b. Petitioner's contention (Pet. 9-24) that a bargaining demand from the Unions was necessary to trigger its obligation to bargain, and that the court of appeals' decision to the contrary creates a decisional conflict, is without merit. A successor employer's obligation to bargain with the union that represents its predecessor's employees flows from Sections 8(a)(5) and 9(a) of the Act. See pp. 5-6, *supra*. Neither statutory provision requires an outstanding bargaining demand as a condition precedent to a successor's bargaining obligation. Rather, the " 'triggering' fact" that creates the bargaining obligation is the successor's hiring of a workforce the majority of which were unionized employees of the predecessor. *Fall River Dyeing*, 482 U.S. at 46 &

n.12. Here, petitioner's bargaining obligation was triggered on April 19, when petitioner had hired virtually all of its workforce from among ABN's unionized employees. Thus, petitioner's position on that date was akin to that of an employer confronted with a newly selected bargaining representative; such an employer is not free thereafter to change conditions of employment without bargaining with the union.

Contrary to petitioner's contention (Pet. 11-12, 15), neither *Burns* nor *Fall River Dyeing* requires a bargaining demand in order to trigger petitioner's duty to bargain in this case. *Burns* involved a successor employer that began providing security services at an aircraft plant one day after the predecessor's service contract expired. On its first day of operations, the successor employer in *Burns*, like petitioner in this case, had in place its entire workforce, a majority of which had worked for the predecessor, and the predecessor's employees had recently voted for union representation in a Board election. 406 U.S. at 274-275. The Court held that the successor's obligation to bargain with the union "mature[d]" when "it had selected its force of guards," for, at that point, it was "evident" that "the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act." *Id.* at 295; see also *id.* at 278-279. Although the union had made a demand for recognition upon the successor some two weeks after it had begun operations (*id.* at 275-276), the Court's holding did not condition the existence of the successor's bargaining obligation upon that demand; rather, the Court stated that, "where the bargaining unit remains unchanged and a majority of the employees hired by the new em-

ployer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union." *Id.* at 281. In *Fall River Dyeing*, the Court reaffirmed the central holding of *Burns*, explaining: "In *Burns*, the Court determined that the successor had an obligation to bargain with the union because a majority of its employees had been employed by [the predecessor]. The 'triggering' fact for the bargaining obligation was this composition of the successor's work force." 482 U.S. at 46 (citation omitted).

Petitioner's contention that, under *Fall River Dyeing*, petitioner has no bargaining obligation in the absence of a demand by the Unions is incorrect. *Fall River Dyeing* involved special rules governing a successor's obligation to bargain in the context of gradual hiring during a prolonged start-up period, 482 U.S. at 46-53, and those rules are inapposite to a case such as this one involving a rapid start-up with a full complement of employees. As the *Fall River Dyeing* Court observed, where hiring occurs gradually, there may be uncertainty as to the correct date for making the assessment, on which the duty to bargain turns, regarding whether a majority of a successor's workforce is comprised of the predecessor's employees. *Id.* at 47. The Court sustained the Board's rule requiring that, in the context of a gradual transition, the determination be made when the successor has hired a "substantial and representative complement" of its employees, as opposed to when the successor has hired a full complement of employees. *Id.* at 47-52. The Court further concluded that "[t]he successor's duty

to bargain at the 'substantial and representative complement' date is triggered only when the union has made a bargaining demand," and that, "[u]nder the 'continuing demand' rule, when a union has made a premature demand that has been rejected by the employer, this demand remains in force until the moment when the employer attains the 'substantial and representative complement.' " *Id.* at 52.

In the context of a *Fall River Dyeing*-type successorship, the requirement of a bargaining demand serves a useful purpose. Where there has been "a start-up period by the new employer while it gradually builds its operations and hires employees" (482 U.S. at 47), there is, correspondingly, a significant period of time that elapses between the successor's initial resumption of operations and its hiring of a "substantial and representative complement" of employees. During the interval leading up to the "substantial and representative complement" date, the union lacks authority to act in its former capacity as the bargaining representative of the unit employees; further, during that interval, the successor may lawfully alter the employees' terms and conditions of employment without bargaining with the union. In these circumstances, the union, for practical reasons, may well have lost interest in continuing to represent the bargaining unit by the time the successor has hired a "substantial and representative complement" of employees. It is therefore reasonable, in such successorships, to require the union, if in fact it remains interested in representing the bargaining unit, to manifest that continued interest by making a bargaining demand upon the successor.

Different considerations apply, however, in a non-*Fall River* successorship. Where, as here, the interval

between the predecessor's demise and the successor's resumption of operations is but a matter of days, and the successor resumes operations with a full complement of employees, the union experiences only a brief period of time during which it lacks authority to represent the bargaining unit. Further, where, as here, the successor elects to operate the enterprise under terms of employment that differ only minimally from the predecessor's, the fruits of the union's contract negotiations with the predecessor remain essentially intact. In these circumstances, unlike in those presented by a *Fall River Dyeing* successorship, there is little reason to question the union's continued interest in representing the bargaining unit.[4] Accordingly, the employer's obligation not to make further unilateral changes without bargaining with the union quickly becomes manifest, and it would elevate form over substance nonetheless to require the union to issue the successor a bargaining demand. See Pet. App. 18.

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[4] Although petitioner asserts (Pet. 22-23) that "unions often walk away from representation for a variety of business reasons," and that "six of the eleven unions at ABN did not pursue representation of [petitioner's] employees," those unions may well have concluded that establishment of a meaningful bargaining relationship with petitioner was improbable in light of its unlawful unilateral changes. Petitioner also asserts (*ibid.*) that it "reduced by half an already small, balkanized ABN workforce," and that "[a] union could easily have decided it was not worth the trouble to represent units with only a few employees." However, as petitioner acknowledges (Pet. 22), although the bargaining unit represented by Machinists District 15 contained only two employees after petitioner reopened the plant, nonetheless, District 15 filed unfair labor practice charges against petitioner in protest of its unilateral changes (Pet. App. 3), thereby demonstrating that it had not abandoned representation of the unit.

In sum, the court of appeals correctly ruled, consistent with *Burns* and *Fall River Dyeing*, that petitioner's obligation not to make unilateral changes without bargaining was triggered by its hiring, on April 19, of a full workforce a majority of which was comprised of former ABN unionized employees, and that that legal obligation did not depend on the presence of a bargaining demand by the Unions. See Pet. App. 19.[5]

Contrary to petitioner's contention (Pet. 12-13), the decision below is also consistent with *NLRB* v. *Wayne Convalescent Center, Inc.*, 465 F.2d 1039 (6th Cir. 1972), and *NLRB* v. *Houston Building Service, Inc.*, 936 F.2d 178 (5th Cir. 1991), cert. denied, 502 U.S. 1090 (1992). In *Wayne Convalescent Center*, the court held that the successor acted lawfully in establishing initial terms of employment without first bargaining with the union, and that the successor was not justified in refusing, on the basis of an alleged good-faith doubt as to the union's majority status, to honor the union's subsequent demand for recognition

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[5] Petitioner's reliance (Pet. 11, 21) on *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), is misplaced. In that case, which did not involve a successorship, the Court held that the employer did not violate the NLRA in refusing to negotiate with federal labor conciliators during a strike called by the union, because there was "no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain or that [the employer] knew that [the conciliators] represented the Union." *Id.* at 298. While some manifestation of a union's "willingness to bargain" may be necessary to a finding that an employer unlawfully refused to bargain with the union in the setting of an ongoing work stoppage, this case does not involve a work stoppage, nor any other reason to believe that the Unions were unwilling to bargain.

and execution of the contract previously negotiated with the predecessor. 465 F.2d at 1042-1044. This case does not involve any challenge to petitioner's unilaterally adopted initial terms, nor any good-faith doubt as to the fact that a majority of petitioner's employees had worked for ABN.

In *Houston Building Service*, the court stated that, where a majority of the employees in "a representative workforce" of the successor was employed by the predecessor, the successor is obligated to bargain with the union that represents those employees, "assuming that the union has made a bargaining demand." 936 F.2d at 180. The court, however, had no occasion to consider whether a successor's unilateral changes may be unlawful even in the absence of a bargaining demand, given that the union in that case had made such a demand. *Ibid.*[a]

2. Petitioner also contends (Pet. 24-28) that the Board exceeded its statutory authority in fashioning the remedy in this case, insofar as the Board ordered petitioner to make employees whole for losses suffered as a result of its unlawful unilateral changes. Petitioner's claim, however, is not properly presented, and, in any event, lacks merit.

Petitioner did not initially challenge the Board's remedy on appeal. It was not until petitioner filed a petition for rehearing in the court of appeals that it contended that the Board exceeded its authority in ordering a make-whole remedy. The court of appeals denied the petition. Pet. App. 75-76. The court of

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[a] Petitioner also suggests (Pet. 13) that the Board's decision in this case is inconsistent with its decision in *Royal Midtown Chrysler Plymouth, Inc.*, 296 N.L.R.B. 1039 (1989). Any such inconsistency would not, however, warrant this Court's intervention. Cf. Sup. Ct. R. 10(a) and (c).

appeals has not ruled on the remedial issue, and this Court should decline to review it without "the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992); see also *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's challenge to the remedy the Board ordered is without merit. Because petitioner succeeded to ABN's bargaining obligation on April 19, 1990, it then stood in the shoes of its predecessor, and thereafter was subject, as ABN would have been, to all prevailing collectively bargained employer obligations. While petitioner had the right unilaterally to change any initial terms and conditions of employment on which it opened for business on April 19, the court of appeals held that "[petitioner] established only two 'initial' terms here: that it would continue employee health benefits for sixty days, and that it would introduce greater 'flexibility' in the workplace." Pet. App. 22 n.5. Thus, on April 19, the prevailing terms were virtually identical to ABN's. Petitioner then unlawfully altered the prevailing terms on April 23.[7] The Board, in an effort to restore the pre-April 23 status quo, ordered petitioner to rescind any unilateral changes that it had not announced prior to opening on April 19, and to make the unit employees whole for any losses suffered as a result of those changes. Pet. App. 49, 70-71. Such make-whole relief is a routine, reasonable exercise

[7] Petitioner on April 23 instituted, *inter alia*, a new health and welfare benefits program, and thus did not even "act consistently with its pre-April 19 announcement to employees that the predecessor's health benefits would continue in effect for 60 days." Pet. App. 49 n.9.

of the Board's remedial authority. See, *e.g.*, *Blitz Maintenance, Inc.*, 297 N.L.R.B. 1005, 1005 n.2, 1010, enforced mem., 919 F.2d 141 (6th Cir. 1990); *Houston Building Service, Inc.*, 296 N.L.R.B. 808, 814-815 (1989), enforced, 936 F.2d 178 (5th Cir. 1991), cert. denied, 502 U.S. 1090 (1992).

There is no merit to petitioner's contention (Pet. 24, 25-26) that the Board's make-whole order effectively binds it to the terms of ABN's labor contracts, in contravention of Section 8(d) of the Act. Section 8(d), 29 U.S.C. 158(d), provides, in relevant part, that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." See also *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Board's remedy is consistent with that principle, for petitioner itself, when it opened for business on April 19 without having made any substantial changes in the prevailing terms of employment, elected to adopt the bulk of ABN's employment terms. Moreover, the Board's order requires petitioner to continue to observe its chosen terms only until it has bargained with the Unions for new terms. See Pet. App. 71. If, after good-faith negotiations, the parties reach a bargaining impasse, petitioner will be free unilaterally to implement changes that are "reasonably comprehended within [its] pre-impasse proposals." *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), enforced *sub nom. American Federation of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

Petitioner further errs in contending (Pet. 26, 28) that the Board's remedy is inconsistent with *Burns*, *supra*. There, the Court declined to enforce the

Board's make-whole remedy because, in the circumstances of that case, the Court found it "difficult to understand how [the successor] could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had * * * no outstanding terms and conditions of employment from which a change could be inferred." 406 U.S. at 294-296. *Burns* dealt with the terms on which the successor initially hired its employees. Here, by contrast, petitioner had already completed its hiring, had "outstanding" employment terms in place before April 23, and its unilateral changes on that date were a clear departure from those terms. Because the Board's remedial determinations "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994), the court of appeals correctly enforced the Board's order.[8]

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[8] Contrary to petitioner's suggestion (Pet. 26), the decision below is not inconsistent with *NLRB* v. *Dent*, 534 F.2d 844 (9th Cir. 1976). There, the Board found that the successor unlawfully unilaterally lowered the employees' wages, and the Board ordered it to pay the employees backpay based on their former wage rate. *Id.* at 845. The court agreed with the Board that the successor's unilateral changes constituted an unfair labor practice (*id.* at 846), but declined to enforce the Board's backpay award because the court found it "clear," on the facts presented, that "the [successor] would not have agreed to the wage rates which had existed under the previous contract." *Id.* at 847. Here, by contrast, petitioners effectively assented to ABN's wage rates and continued to apply them when it reopened the plant on April 19 with a full complement of employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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